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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~979~~ 29

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
PETITIONERS,

vs.

THE STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1942.

CERTIORARI GRANTED MARCH 30, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
PETITIONERS,

vs.

THE STATE OF NORTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 4, 1942.

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[fol. 1]

IN SUPERIOR COURT OF CALDWELL COUNTY

STATE

v.

O. B. WILLIAMS and LILLY SHAVER HENDRIX

ORGANIZATION OF THE COURT

Be it remembered, that a Superior Court Term is begun and held for the County of Caldwell, at the Courthouse in Lenoir, North Carolina, on the first Monday before the first Monday in March (it being February 24, 1941), when and where the Honorable H. Hoyle Sink being present and holding the said Court.

Honorable L. S. Spurling, Solicitor for the 16th Judicial District, being present and prosecuting in behalf of the State.

J. F. Parlier, Sheriff of Caldwell County, North Carolina, returned as summoned by him, the following good and lawful men to serve as jurors: A. S. Nelson (Foreman) and others (naming them).

IN SUPERIOR COURT OF CALDWELL COUNTY

BILL OF INDICTMENT

The jurors for the State, upon their oath, present: That O. B. Williams and Lillie Shaver Hendrix, late of the County of Caldwell, on the 4th day of October, in the year [fol. 2] of our Lord One Thousand Nine Hundred and Forty, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did get married to each other in the City of Las Vegas in the State of Nevada, and thereafter returned to the State of North Carolina and did live together and cohabit together in the said State of North Carolina and in Caldwell County, the said O. B. Williams having a living wife, one Mrs. O. B. Wyke Williams, living in Caldwell County, North Carolina, at the time of his said marriage to Lillie Shaver Hendrix and the said Lillie Shaver Hendrix having a living husband, one Tom Hendrix, living in Caldwell County, North Carolina, at the time of her marriage

to the said O. B. Williams, against the form of the statute in such case made and provided and against the peace and dignity of the State.

L. S. Spurling, Solicitor.

Returned a True Bill:

A. S. Nelson, Foreman Grand Jury.

In Superior Court of Caldwell County

Plea

And the said O. B. Williams and Lillie Shaver Hendrix are brought to the bar of the Court here in their proper persons, by the said Sheriff of Caldwell County, in whose custody they are. And forthwith, it being demanded of them how they will acquit themselves of the premises in the said indictment, above specified and charged upon them, they saith that they are not guilty thereof, and thereof for good and for evil they put themselves upon the Country. And L. S. Spurling, Solicitor who prosecutes for the State on this behalf, does the like.

In Superior Court of Caldwell County

Verdict etc.

Therefore, let a jury come of good and lawful men, by whom the truth of the matter may be better known. The prisoners, O. B. Williams and Lillie Shaver Hendrix, are remanded to jail. And at the same term of said court, in the custody of the Sheriff of Caldwell County, the said O. B. Williams and Lillie Shaver Hendrix are again brought [fol. 3] to the bar of said Court, and the following jury of good and lawful men, towit: R. S. Webb and eleven others (naming them), sworn and impaneled to speak of and concerning the premises, upon their oaths, say that said O. B. Williams and Lillie Shaver Hendrix are guilty as charged in the Bill of Indictment.

Upon the coming in of the verdict the defendants and each of them, in apt time, move the court to set the verdict aside as being against the greater weight of the evidence

and the law in the case, and for errors assigned and to be assigned. Motion denied in each case as to each defendant, and the defendants and each of them except.

To the judgment the defendants, and each of them, except in open Court and appeal to the Supreme Court of North Carolina. Notice of appeal given in open court. Further notice waived. The defendants, appellants shall be allowed 60 days in which to make up and serve statement of case on appeal upon the State's counsel, and the State's counsel shall be allowed 60 days after the service of the case in which to served counter-case or file exceptions. Appeal bond in each case is fixed by the Court at $150.00. Appearance bond in each case is fixed at $2500.00, to be justified and approved by the Sheriff of Caldwell County.

IN SUPERIOR COURT OF CALDWELL COUNTY

Statement of Evidence

STATE'S EVIDENCE

MRS. CARRIE WILLIAMS testified as follows on Direct Examination: That she was a Wyke before her marriage; that she now lives about four miles east of Granite Falls, Caldwell County, North Carolina; that she married O. B. Williams on May 30, 1916, in Caldwell County; that she and Williams lived together as husband and wife between 23 and 24 years, or until about May 7, 1940; that they had reared a family of four children; that they had not lived together since May 7, 1940; that she had not brought any action for divorce against O. B. Williams.

[fol. 4] Cross-examination:

I happened to have a paper that the Sheriff served on me here. I read it.

TOM HENDRIX, on Direct Examination, testified as follows: I live in this county. I was married to Lillie Shaver Hendrix about twenty years ago. We lived as husband and wife at Saw Mills in this county until May, 1940. We have not lived together since that time. I have brought no divorce proceedings against my wife.

Cross-examination:

Witness admits his signature on a card. Said card is identified as Exhibit No. 1.

OFFER IN EVIDENCE

CERTIFICATE OF MARRIAGE

99133 33251

STATE OF NEVADA,
County of Clark, ss:

This Is To Certify That the undersigned, C. H. Sloan, did, on the 4th day of October, A. D. 1940, join in lawful wedlock O. B. Williams of Las Vegas, State of Nevada, and Lillie Esther Shaver of Las Vegas, State of Nevada, with their mutual consent in the presence of Mrs. Jack Pembroke and Mrs. Charles H. Sloan, who were witnesses.

C. H. Sloan, Baptist Minister.

Mrs. Jack Pembroke, Mrs. Charles H. Sloan, Witnesses.

Recorded at the request of C. H. Sloan,
Filed Oct. 8, 1940.

David Farnsworth, County Recorder.

RECORDER'S CERTIFICATION

STATE OF NEVADA,
County of Clark, ss:

I, David Farnsworth, the duly elected, qualified and acting County Recorder, in and for the County of Clark, State of Nevada, do hereby certify and declare the above (attached) to be a full, true and correct copy of that certain Marriage Certificate of Record in Book 17 of Mar. Cert., page 360, Clark County, Nevada, Records.

[fol. 5] Witness my hand and official seal, this 17th day of February, A. D., 1941.

David Farnsworth, John Beodle, Dep.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court

of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that David Farnsworth, whose name is subscribed to the foregoing certificate, was at the time of signing the same, the duly elected, qualified and acting County Recorder in and for the County of Clark, State of Nevada, and authorized to execute said certificate. And I do further certify that the signature of the said David Farnsworth, appearing upon the foregoing certificate is genuine.

In witness whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 18th day of February, 1941.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. (Seal.)

STATE OF NEVADA,
County of Clark, ss:

I, George E. Marshall, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having [fol. 6] a seal); that the signature of the said Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such Clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In witness whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 18th day of February, A. D., 1941.

George E. Marshall, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that George E. Marshall, whose name is subscribed to the foregoing certificate of due attestation, was, at the time of the signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In witness whereof, I have hereunto set my hand and annexed the seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark this 18th day of February, 1941.

[fol. 7] Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. (Seal.)

CHARLES TEAGUE, on Direct Examination, testified: That he knew O. B. Williams and Lillie Shaver Hendrix; that he had a conversation with them sometime last Fall in Avery County; that he had seen them together in Granite Falls a number of times; that he saw them in daytime; that when he saw them in Avery County they were in the cafe.

I. M. VANCE, on Direct Examination, testified: That he lived at Pineola, in Avery County; that he was one of the County Commissioners; that he has known O. B. Williams since he has been in Avery County, which has been about seven or eight months; that he knows Lillie Shaver Hendrix, the female defendant. I have seen them together in my store and at church and at homes where they were visiting the sick. I have been in their home, and they have a home in Pineola, and I understand they own it.

I have seen Mr. Williams and Mrs. Hendrix there at their home. I don't think I have ever been there when only the two of them were there. The defendants have been in my home but I would not say whether it was daytime or night. I have seen them together in the automobile and at church and around Pineola. They were together about all the time. They buy some groceries from my place. I know of no one living in their home with them. They always paid cash. My wife and I went to Mr. Williams' home to see some people once, and at another time made a social visit. To the best of my knowledge this was at night. There were about six or eight other people there. No refreshments were served. Both Mr. Williams and the lady greeted us at the door. I have seen them together about eight months. [fol. 8] I couldn't say that they cook and eat at their home. They live there.

Cross-examination:

On the occasion of the visit Preacher Greene and others were there. I have known the general reputation of O. B. Williams and the lady since they have been in my community, and it has been excellent.

T. A. THOMPSON, on Direct Examination, testified: I live in Pineola, Avery County. I know Mr. Williams and have known him since some time in February. I met them at Pineola Baptist Church.

Q. Do you know whether they are living together and have been living together for sometime in Pineola as husband and wife?

Defendants object—overruled—exception.
This is defendants' Exception No. 1.

A. Yes.
Q. Have they?

Defendants object—overruled—exception. Exception No. 2.

A. Yes.

To the best of my knowledge they have lived together since about August or September, I wouldn't say exactly.

I have seen them together quite a little bit at church and around at Preacher Greene's at the parsonage. I have seen them together maybe twice a week or maybe sometimes once a month. I saw them at the Post Office one evening last week.

Cross-examination:

I know the general reputation and character of O. B. Williams since he has been in our community, and it has been perfectly good. I know the general reputation of the female defendant since she has been in our community, and it is good.

[fol. 9] R. G. Buchanan, on Direct Examination, testified: I live in Pineola, Avery County. I know the two defendants, Mr. Williams and the woman, and have known them for about eight months. They live in Pineola as man and wife.

Cross-examination:

I have known them something like six or eight months. I have been to their home twice. I have known their general repatation since they have been in the community, and it is good.

Redirect examination:

I have seen them together very often. It has been about two weeks since I last saw them together.

Recross-examination:

Most of my contact with the defendants has been at church and at Sunday School.

State Rests.

Order Denying Motion for Nonsuit

At the close of the State's evidence the defendants and each of them move for judgment as of nonsuit. Motion denied as to each defendant, and the defendants and each of them except.

DEFENDANTS' EVIDENCE.

Exception No. 3.

The Defendants Offered the following evidence:

Exhibit No. 1, identified by Thomas Hendrix. The addressed side of the card is as follows:

"I. S. Thompson, Attorney at Law, Rooms 5 & 6, Griffith Bldg., Las Vegas, Nevada."

The reverse side of the card is as follows:

"Dear sir:

Upon receipt of the original appearance, I will sign the same.

(Signed) Thomas Hendrix."

Defendants' Exhibit No. 2 (Exemplified copy of the divorce proceedings from the Eighth Judicial District of the Court of the State of Nevada in and for Clark County in an action entitled Lillie Esther Hendrix v, Thomas George Hendrix):

[fol. 10] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

GEORGE THOMAS HENDRIX, Defendant

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I. That on June 27th, 1920, in Icard, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been and are now wife and husband.

II. That plaintiff is now and has been a resident of the State of Nevada for a period of more than six weeks immediately preceding the commencement of this action; she

has been, and now is a resident of the County of Clark, State of Nevada.

III. That there is no issue of said marriage.

IV. That the defendant has willfully neglected for the period of over one year immediately preceding the commencement of this action to provide plaintiff with the common necessities of life, although having the ability to do so; that such neglect was and is not the result of poverty on the part of the defendant, which he could not avoid by ordinary industry.

For a second and separate cause of action against the defendant, plaintiff alleges:

V. That the allegations set forth in paragraphs I, II, and III, of plaintiff's first cause of action are true and are hereby made a part of this cause of action.

VI. That during the term of said marriage, the defendant has been guilty of extreme mental cruelty toward this plaintiff by his words, actions and conduct; and plaintiff therefore alleges, that during the term of said married life the defendant has been guilty of extreme cruelty toward the plaintiff.

[fol. 11]. Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons.

L. S. Thompson, Attorney for Plaintiff.

STATE OF NEVADA,
County of Clark, ss:

Lillie Esther Hendrix, being first duly sworn deposes and says that she is the plaintiff in the above entitled action, and that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge.

Lillie Esther Hendrix.

Subscribed and sworn before me, this 26th day of June, 1940. L. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT FOR PUBLICATION OF SUMMONS

Filed July 22, 1940.
Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

STATE OF NEVADA,
County of Clark, ss:

Lillie Esther Hendrix, being first duly sworn, deposes and says that she is the plaintiff in the above entitled suit; that the complaint in said action has been filed with the Clerk of the above Court and summons thereupon issued; that said action is brought to recover a judgment of the above Court dissolving the bonds of matrimony now existing between the plaintiff and defendant, on the grounds [fol. 12] of extreme cruelty; that such causes of action are more fully set forth in plaintiff's verified complaint on file herein, to which you are referred to for further particulars and which is hereby made a part of this affidavit; that the defendant is a necessary and proper party defendant in this action.

That the defendant, Thomas George Hendrix, resides outside the State of Nevada, to-wit, at 391 Fuller Street, Akron, Ohio, and that he is not now and cannot be found in the State of Nevada and that defendant's present place of residence is 391 Fuller Street, Akron, Ohio.

Affiant, therefore, says that personal service of the summons in this action cannot be made upon the defendant, Thomas George Hendrix, and prays for an order that service of the same be made by publication thereof.

Lillie Esther Hendrix.

Subscribed and sworn to before me, this 20th day of July, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

ORDER DIRECTING PUBLICATION OF SUMMONS

Filed July 22, 1940.
Lloyd S. Payne, Clerk, by Helen Scott, Deputy Clerk.
Clerk.

Upon reading and filing the affidavit of Lillie Esther Hendrix, the plaintiff above named, and it satisfactorily appearing therefrom that the defendant, Thomas George Hendrix, resides out of the State of Nevada and at 391 Fuller Street, Akron, Ohio; and it also appearing from the complaint herein duly verified by the plaintiff, that [fol. 13] good cause of action exists in this action in favor of the plaintiff, Lillie Esther Hendrix, and against the defendant, Thomas George Hendrix, and that the defendant, Thomas George Hendrix, is a necessary and proper party defendant thereto; and it further appearing that a summons has been issued out of said Court in this cause and that a personal service of the same cannot be made upon the defendant, Thomas George Hendrix, for the reasons hereinbefore contained, and by the said affidavit made to appear.

On motion of I. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Thomas George Hendrix, by publication thereof in the Las Vegas Evening Review Journal, a newspaper published in the City of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give notice to said defendant; that said publication be made for a period of four weeks and at least once a week during said time.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known as 391 Fuller Street, Akron, Ohio, and that his post office address

is 391 Fuller Street, Akron, Ohio; it is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Post Office at the City of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at his said post office address.

Dated this 22 day of July, 1940.

Roger Foley, District Judge.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

SUMMONS

[fol. 14] Returned and filed October 4, 1940.
Lloyd S. Payne, Clerk. Dolores Yturri, Deputy.

The State of Nevada sends greetings to said defendant:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your willful neglect, and your extreme cruelty toward plaintiff, all of which will more fully appear from plaintiff's verified complaint now on file in this action, to which you are referred for further particulars.

Dated this 26th day of June, A. D., 1940.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada. By: Tilla Cronick, Deputy.

I. S. Thompson, Attorney for Plaintiff, Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada. (Seal.)

13—1575

Sheriff's Return

Received at Sheriff's Office, Summit County, July 24th, 9:19 A. M., 1940.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

[fol. 15] AFFIDAVIT OF MAILING COPY OF SUMMONS AND COMPLAINT

Filed October 4, 1940.
Lloyd S. Payne, Clerk. By: Dolores Yturri, Deputy.

STATE OF NEVADA,
County of Clark, ss:

George W. Thompson, of said County, being duly sworn, says that he is over the age of twenty-one, and is not a party to the above-entitled action;

That on the 26th day of June, 1940, the complaint in said action was filed and that thereafter an order was made by the Court for the publication of the summons in said action; and also a further order that a copy of said summons should be deposited in the United States Post Office at Las Vegas, in said County and State, directed to the defendant, Thomas George Hendrix, in said action, at his place of residence, to-wit, number 391 Fuller Street, in the City of Akron, County of Summit, State of Ohio; that, to-wit, on the 10th day of August, 1940, and in pursuance of the said order of the Court, he, the said affiant, deposited in the United States Post Office at the City of Las Vegas, County of Clark, State of Nevada, a true copy of the said summons attached a true copy of the said complaint duly certified to by the attorney for the plaintiff, enclosed in a sealed envelope, directed to Thomas George Hendrix,

the said defendant, at number 391 Fuller Street, in the City of Akron, County of Summit, State of Ohio, the place of his residence as aforesaid, and paid the postage thereon in advance; and that there is a regular communication by the United States mails from said post office of deposit thereof, as aforesaid, to said defendant's said place of residence.

George W. Thompson.

Subscribed and sworn to before me, this 10th day of August, 1940.

I. S. Thompson, Notary Public. (Seal.)

[fol. 16] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant.

SUMMONS

The State of Nevada sends greetings to said defendant:

You are hereby summoned to appear after the service upon you of this summons, if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your willful neglect of, and your extreme cruelty toward the plaintiff, all of which will more fully appear from plaintiff's verified complaint now on file in this action, to which you are referred for further particulars.

Dated this 26th day of June, A. D. 1940.

Lloyd S. Payne, Clerk of the Eighth District Court of the State of Nevada, in and for Clark County, Nevada, by Tilla Cronick, Deputy. (Seal.)

L. S. Thompson, Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada, Attorney for Plaintiff.
Aug. 7, 14th, 21st, 28th, Sept. 4th.

STATE OF NEVADA,
County of Clark, ss:

Dick Lochrie, being first duly sworn, deposes and says: That he is foreman of the Las Vegas Evening Review-Journal, a daily newspaper, of general circulation, printed and published at Las Vegas, in the County of Clark, State [fol. 17] of Nevada, and that the attached was continuously published in said newspaper for a period of five weeks from August 7, 1940, to Sept. 4th, 1940, inclusive, being the issues of said newspaper was regularly issued and circulated on each of the dates above named.

Signed: Dick Lochrie.

Subscribed and sworn before me, this 13th day of September, 1940. A. E. Cahlan, Notary Public in and for Clark County. My Commission Expires: Jan. 12, 1943. (Seal.)

Filed October 4, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

DECREE OF DIVORCE

Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

The above entitled cause coming on regularly for hearing this day, in open Court, before the Honorable Roger Foley, Judge of said Court, presiding; Present Lillie Esther

Hendrix, plaintiff, in person and by her attorney, I. S. Thompson, the defendant not appearing and the Court having before it all the files, pleadings and papers in the action and being fully advised in the premises, finds that this action has been regularly commenced; and that the plaintiff is now and has been a bona fide resident of the County of Clark, State of Nevada for more than six weeks immediately preceding the commencement of this action; that the defendant has been duly and regularly served with summons in this action in the manner prescribed by law and the order of this Court: that after the order [fol. 18] was made directing the publication of the summons, the plaintiff used every effort to locate the defendant in order to serve the summons upon him personally but was unable to do so because of his dodging service; that the service of summons was made by publication in The Las Vegas Evening Review-Journal, for a period of four weeks and at least once a week during said time; and the default of the defendant has been duly entered for failure to answer plaintiff's complaint within the time allowed by law; and the defendant not having appeared for trial of said action either in person or by attorney and that the Court has complete jurisdiction of the matter both as to the subject matter and the parties to the action.

Now, therefore, after hearing the witnesses sworn and examined in open Court and the said cause having been submitted and the Court being fully advised in the premises and having fully considered all the evidence in the case, finds that all the averments contained in plaintiff's complaint are true as therein alleged; that the plaintiff, Lillie Esther Hendrix, is without fault in the premises, and is entitled to a Decree of Divorce from the defendant, Thomas George Hendrix, on the grounds of his willful neglect of and extreme cruelty toward the plaintiff.

It is, therefore, ordered, adjudged and decreed that a contract of marriage now existing between the plaintiff, Lillie Esther Hendrix, and the defendant, Thomas George Hendrix, be and the same is hereby dissolved, set aside and forever held at naught; and that the said parties are absolutely divorced and released from any and all marital obligations each to the other, and are hereby restored to the status of single persons.

Done in open Court, this 4th day of October, 1940.

Roger Foley, District Judge.

[fol. 19] In the District Court of the Eighth Judicial District of the State of Nevada in and for Clark County

No. 10651

Lillie Esther Hendrix, Plaintiff,

vs.

Thomas George Hendrix, Defendant

Judgment Roll

Filed October 8, 1940. Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy.

I, the undersigned County Clerk and Ex-Officio Clerk of the District Court of the Eighth Judicial District in and for said County and State, do hereby certify that the foregoing is a true copy of the judgment entered in the above entitled action recorded in Judgment Book 11 of the said Court at pages 228-9; and I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of the District Court, this 8th day of October, 1940.

Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy.
(Seal.)

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

No. 10651

Lillie Esther Hendrix, Plaintiff,

vs.

Thomas George Hendrix, Defendant

Praecipe for Default

Filed October 4, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy.

To the Clerk of the Above Entitled Court:

The defendant above named, Thomas George Hendrix, having been duly and regularly served with process herein, and having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in de-

fault, you are hereby requested and directed to enter the [fol. 20] default of said defendant.

Dated this 4th day of October, 1940.

I. S. Thompson, Attorney for Plaintiff.

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

No. 10651

Lillie Esther Hendrix, Plaintiff,
vs.
Thomas George Hendrix, Defendant

Default

Filed Oct. 4, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy.

It appearing from the files and records in the above entitled action that Thomas George Hendrix, defendant herein, was duly served with summons by publication, and that more than thirty days, exclusive of the day of service, have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted, the default of Thomas George Hendrix, defendant herein, in failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and seal of said Court, this 4th day of October, A. D., 1940.

Lloyd S. Payne, Clerk, by Dolores Yturri, Dep. Clerk.
(Seal.)

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

No. 10651

Lillie Esther Hendrix, Plaintiff,
vs.
Thomas George Hendrix, Defendant

Affidavit as to Residence of Plaintiff

State of Nevada,
County of Clark, ss:

Lillie Roesselet, being first duly sworn, deposes and says [fol. 21] that she is and was, on all dates hereinafter men-

tioned, over the age of twenty-one years. That she is not a party to, nor has she any interest in, the above entitled action. That she resided in the State of Nevada, County of Clark, during the dates and times hereinafter mentioned. That on May 15, 1940, she was residing in and conducting the Alamo Auto Court on the highway leading from Los Angeles, California, to Las Vegas, Nevada, called the Los Angeles Highway; that on said last named date Lillie Esther Hendrix, the plaintiff above named, came there to live, rented a room and is still living there; that said Lillie Esther Hendrix was present every day, at said place, from the date she came there, May 15, 1940, up to and including June 26, 1940.

Lillie Roesselet.

Subscribed to and sworn before me, this 16th day of September, 1940. I. S. Thompson, Notary Public. (Seal.)

Plaintiff's Exhibit 1. Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

AFFIDAVIT OF NON-MILITARY SERVICE OF DEFENDANT

Filed October 4, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Dep.

STATE OF NEVADA,
County of Clark, ss:

LILLIE ESTHER HENDRIX, being first duly sworn, deposes and says that she is above the age of majority and is the plaintiff in the above entitled suit and the wife of Thomas

Hendrix, the defendant in the said suit, and has been such [fol. 22] for more than twenty (20) years last past; that he is above forty-five (45) years of age and not subject to draft under the laws of the United States; that she knows of her own knowledge that said Thomas C. Hendrix, defendant, is not now and has not been at any time since 1920, in the military service of the United States or in the militia of the State of North Carolina, where he has resided since 1920, or in the militia of any other State; that he is not now, nor has *he* been since said marriage to plaintiff, in the service of the United States Government in any capacity whatsoever.

Lillie Esther Hendrix.

Subscribed and sworn to before me, this 1st day of October, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10651

LILLIE ESTHER HENDRIX, Plaintiff,

vs.

THOMAS GEORGE HENDRIX, Defendant

Filed Oct. 8, 1940. Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy.

Before Hon. Roger Foley, District Judge.
9:45 A. M., October 4, 1940.
J. S. Thompson, Esq., Attorney for Plaintiff.

COMPLAINT WAS FILED ON JUNE 26, 1940. AFFIDAVIT AND ORDER FOR PUBLICATION ON FILE. SUMMONS RETURNED. AFFIDAVIT OF NON-MILITARY SERVICE OF DEFENDANT ON FILE. DEFAULT ENTERED OCTOBER 4, 1940.

LILLIE ESTHER HENDRIX was called as a witness in her own behalf, and after being first duly sworn was examined by Mr. Thompson, and testified as follows:

Q. Your name is Lillie Esther Hendrix?
A. Yes.

Q. You are the plaintiff in the case?

A. Yes.

[fol. 23] Q. The defendant, Thomas George Hendrix, is your husband?

A. Yes.

Q. You were married June 27, 1920, at Icard, North Carolina?

A. Yes.

Q. Where do you reside?

A. Las Vegas, Nevada.

Q. Las Vegas, Clark County, Nevada?

A. Yes.

Q. You filed your complaint on June 26, 1940; had you resided here a full six weeks prior to that time?

A. Yes.

Q. When did you come to Clark County, Nevada?

A. May 15, 1940.

Q. What was your object and intention in coming here at that time?

A. To establish a residence.

Q. And did you establish a residence?

A. Yes.

Q. And that residence was an indefinite permanent residence?

A. Yes, sir.

Q. And from May 15, 1940, down to the day you filed your complaint, were you absent from the county or the State?

A. No, sir.

Q. You were here every day?

A. Yes, sir.

Q. Where did you reside during that time?

A. At the Alamo Court.

Q. You were there until after you filed your complaint?

A. Yes.

Q. Are there any children of this marriage?

A. No, sir.

Q. In the fourth paragraph you allege the defendant has willfully neglected for a period of over one year immediately preceding the commencement of this action to provide the plaintiff with the common necessaries of life, although having the ability to do so, and that such neglect is not and was not the result of poverty on the part of the defendant which he could not avoid by ordinary industry; is that true?

A. Yes.

[fol. 24] Q. During past year was your husband well and healthy?

A. Yes.

Q. And able to work?

A. Yes.

Q. And able to earn a living for you and he?

A. Yes.

Q. And he didn't do it?

A. Never.

Q. The sixth paragraph of the complaint alleges that during the term of said marriage the defendant has been guilty of extreme mental cruelty towards this plaintiff by his words, actions and conduct; plaintiff therefore alleges that during said married life defendant has been guilty of extreme mental cruelty towards this plaintiff; is that true?

A. Yes.

Q. Now, I will ask you what was his actions towards you when he was home; was he cheerful?

A. No.

Q. Was he moody?

A. Yes.

Q. Did he talk to you or speak to you?

A. Not often.

Q. How about you speaking to him, did he always answer you?

A. Well, most of the time it was a nod or a shake of the head.

Q. There was nothing cheerful about him at all?

A. No, there was not.

Q. Now, when the bills would come in at the end of the month or at the time they should be paid, would he pay them?

A. No, sir, he didn't.

Q. Did your mother and father often have to pay them?

A. They paid money for me.

Q. I will ask you how did these things affect you mentally, his actions in regard to failure to provide for you and these bills coming in, and his moody disposition?

A. It worried me till I didn't care whether I lived or did anything.

Q. Did it cause you great mental worry?

A. It certainly did.

[fol. 25] Q. I will ask you now if you made every effort to get personal service upon the defendant in this case?

A. Yes, I have.

Q. Now, just prior to the commencement of this suit did you have your attorney write him in regard to this matter?

A. Yes.

Q. And did you ever see that letter or a copy of the letter?

A. Yes.

Q. And in the last paragraph after reciting that you were bringing a suit, "Please indicate your willingness to sign such an appearance when it comes to you by mailing the enclosed postal card." Did you ever see the postal card that was sent in that letter?

A. Yes.

Q. Did he sign that postal card?

A. Yes, sir.

Q. And it was sent to your attorney?

A. Yes, sir.

Q. Do you know whether or not he employed an attorney in North Carolina?

A. Yes.

Q. And a letter came from the attorney?

A. Yes.

Q. Have you got their names?

A. Yes.

Q. What were their names?

A. L. M. Abernathy.

Q. Abernathy and Caldwell? Mr. Abernathy was the man. Mr. Caldwell was with him.

Q. So your husband had full knowledge of the suit?

A. Yes, he did.

Q. Just before filing your complaint you sent an appearance to him?

A. Yes.

Q. Where he lived in North Carolina?

A. Yes.

Q. And you also sent one to Akron, Ohio?

A. Yes.

Q. And one to Darby, North Carolina?

A. Yes.

[fol. 26] Q. These were the different places where he was traveling around?

A. Yes.

Q. Did you enclose any money in any of them?
A. Yes.
Q. A dollar in one and fifty cents in another?
A. Yes.
Q. And the purpose of that was to pay the notary fee?
A. Yes.
Q. Did he ever return that?
A. No.
Q. And after you had sent the papers to the sheriff, the summons to be served?
A. Yes.
Q. And the Sheriff couldn't find him?
A. No.

O. B. WILLIAMS was called as a witness on behalf of the plaintiff, and after being first duly sworn was examined by Mr. Thompson, and testified as follows:

Q. Will you give your name to the reporter?
A. O. B. Williams.
Q. Where do you live?
A. Clark County, Nevada.
Q. Do you know the plaintiff in this action?
A. Yes, sir.
Q. Do you know whether or not she has resided here a full six weeks prior to the commencement of this action?
A. She testified that she came here——

The Court: I wish the witness be asked whether he knows of his own knowledge of the date.

By Mr. Thompson:

Q. Where were you living on the 15th day of May, 1940?
A. At the Alamo Court, Las Vegas.
Q. When did you first see her at that Court?
A. May 15, 1940.
Q. So that she lived there at that Alamo Court until the day she filed her complaint?
A. Yes, sir.
[fol. 27] Q. You saw her every day?
A. Yes, sir.

The Court: That's just the thing I wanted to avoid. I don't want the witness led in regard to date of residence.

Q. Have you any independent recollection of that, or was it suggested to you by counsel?

A. No, I know the date.

Q. Did you make any record of it?

A. (No response).

By Mr. Thompson (to plaintiff):

Q. I will ask you if the lady that runs the Alamo Court is here now?

A. No, she is not.

Q. Where did she go?

A. To California.

Q. I will ask you who was the lady who rented the place?

A. Mrs. Lillie Rosetti.

Mr. Thompson: I will offer in addition to Mr. Williams' testimony the affidavit of Lillie Rosetti, who rented the place, and who is absent from the place.

The Court: It may be admitted in connection with the testimony of the witness.

Q. You are satisfied you first met the lady on the date you testified?

A. Yes.

The Court: Decree to the plaintiff dissolving the marriage between the parties.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in said action.

Marguerite Byler, Court Reporter.

CLERK'S CERTIFICATE

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial

[fol. 28] District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original:

Complaint, Affidavit for Publication of Summons, Order Directing Publication of Summons, Summons, Affidavit of Mailing Copy of Summons and Complaint, Affidavit of Publication, Decree of Divorce, Judgment Roll, Praecipe for Default, Default, Affidavit as to Residence of Plaintiff, Affidavit of Non-Military Service as to Defendant, Reporter's Transcript in the case entitled: Lillie Esther Hendrix, Plaintiff, vs. Thomas George Hendrix, Defendant. #10651. Together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and affixed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 23rd day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

JUDGE'S CERTIFICATE TO CLERK

STATE OF NEVADA,
County of Clark, ss:

I, Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer; that the seal thereto is the seal of said District Court; that said Lloyd S. Payne as such Clerk is the proper officer to execute the said certificate of attesta-
[fol. 29] tion, and that such attestation is in due form according to the laws of the State of Nevada.

In witness whereof, I have hereunto set my hand and in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 23rd day of November, A. D. 1940.

Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

CLERK'S CERTIFICATE TO JUDGE

STATE OF NEVADA,
County of Clark, ss:.

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a court of record, having a seal, which is annexed hereto), do hereby certify that Roger Foley, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In witness whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 23rd day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

[fol. 30] DEFENDANTS' EXHIBIT NO. 2

(Exemplified copy of the divorce proceedings in the Eighth Judicial Court of the State of Nevada, in and for Clark County, and that certain action entitled: Otis Baxter Williams v. Carrie Ora Williams):

IN THE EIGHTH JUDICIAL COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

Filed June 26th, 1940. Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy.

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

1. That in the month of November, 1916, in Granite Falls, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been, and are now, husband and wife.

2. That the plaintiff is now and has been a resident of the State of Nevada for the period of more than six weeks immediately preceding the commencement of this action.

That for more than six weeks immediately preceding the commencement of this action he has been, and is now, a resident of the County of Clark, State of Nevada.

3. That during the term of said marriage the defendant has been guilty of extreme cruelty toward this plaintiff, by her words, actions and conduct;

And plaintiff, therefore, alleges that during the term of said married life the defendant has been guilty of extreme cruelty toward this plaintiff.

Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties [fol. 21] to the status of single persons.

I. S. Thompson, Attorney for Plaintiff.

STATE OF NEVADA,
County of Clark, ss:

Otis Baxter Williams, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled ac-

tion, and that he has read his foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

Otis Baxter Williams.

Subscribed and sworn to before me, this 26th day of June, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

AFFIDAVIT FOR PUBLICATION OF SUMMONS

Endorsed: Filed July 18, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

STATE OF NEVADA,
County of Clark, ss:

Otis Baxter Williams, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled suit; that the complaint in said action has been filed with the Clerk of the above Court and summons thereupon issued; that said action is brought to recover a judgment of the above Court, dissolving the bonds of matrimony now existing between the plaintiff and the defendant, on the grounds of extreme cruelty; that such cause of action is more fully set forth in plaintiff's verified complaint on file herein, to which you are referred to for further particulars, and which is hereby made a part of this affidavit; [fol. 32] that the defendant is a necessary and proper party defendant in this action.

That the defendant, Carrie Ora Williams, resides outside of the State of Nevada, to-wit, at Granite Falls, North Carolina, and that she is not now and cannot be found in the State of Nevada, and that defendant's place of residence is Granite Falls, North Carolina.

Affiant, therefore, says that personal service of the summons in this action cannot be made upon the defendant, Carrie Ora Williams, and prays for an order that service of the same be made by publication thereof.

Otis Baxter Williams.

Subscribed and sworn to before me, this 16th day of July, 1940. I. S. Thompson, Notary Public. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

Endorsed: Filed July 18, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

ORDER DIRECTING PUBLICATION OF SUMMONS

Upon reading and filing the affidavit of Otis Baxter Williams, the plaintiff above named, and it satisfactorily appearing therefrom that the defendant, Carrie Ora Williams, resides out of the State of Nevada and at Granite Falls, North Carolina; And it also appearing from the complaint herein duly verified by the plaintiff that good causes of action exist in this action in favor of the plaintiff, Otis Baxter Williams, and against the defendant, Carrie Ora Williams, and that the defendant, Carrie Ora Williams, is a necessary and proper party defendant thereto; And it further appearing that a summons has been issued out of [fol. 33] said Court in this cause and that personal service of the same cannot be made upon the defendant, Carrie Ora Williams, for the reasons hereinbefore contained and by the said affidavit made to appear.

On motion of I. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Carrie Ora Williams, by publication thereof in the Las Vegas Evening Review-

Journal, a newspaper published in the city of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give notice to said defendant; that said publication be made for a period of four weeks, and at least once a week during said time.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at Granite Falls, North Carolina, and her post office address is Route 1, Granite Falls, North Carolina; It is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Post Office at the city of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at his said post office address.

Dated this 18th day of July, 1940.

Roger Foley, District Judge.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

SUMMONS

Returned and filed Aug. 22, 1940. Lloyd S. Payne, Clerk. Dolores Yturri, Deputy.

The State of Nevada sends greetings to said Defendant:

[fol. 34] You are hereby summoned to appear within ten days after the day of the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

This action is brought to recover a judgment dissolving the bonds of matrimony that now exist between you and the plaintiff on the grounds of your extreme cruelty toward plaintiff, all of which will more fully appear from plaintiff's

verified complaint now on file in this action to which you are referred for further particulars.

Dated this 26th day of June, 1940, A. D.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada, by Tilla Cronick, Deputy. (Seal.)

I. S. Thompson, Attorney for Plaintiff, Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada.

Sheriff's Return

STATE OF NEVADA,
County of Clark, ss:

I, J. F. Parlier, the duly elected, qualified and acting Sheriff of said County and State, do hereby certify and return that I received the within summons on the 18th day of July, A. D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A. D. 1940, at Granite Falls, County of Caldwell, North Carolina, by then and there delivering to her, the said defendant, personally, a copy of said summons attached to a certified copy of the complaint in the within entitled action.

Dated this 22nd day of July, A. D. 1940.

J. F. Parlier, Sheriff Caldwell County, State of North Carolina.

[fol. 35] STATE OF NORTH CAROLINA,
County of Caldwell, ss:

J. F. Parlier, being first duly sworn, deposes and says: That he is and was on the day when he served the within summons a citizen of the United States over the age of twenty-one years, and is not a party to, attorney in, nor has he any interest in the within entitled action; That he personally served the said summons upon Carrie Ora Williams, the within named defendant, on the 22 day of July, 1940, by delivering to said defendant, on said last named day personally, in the County of Caldwell, State of North Carolina, a copy of said summons attached to a true copy of the complaint in the within entitled action, duly certified to by the attorney for the plaintiff therein.

J. F. Parlier.

Subscribed and sworn to before me, this 22nd day of July, 1940. F. H. Hoover, C. S. C. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

DECREE OF DIVORCE

Endorsed: Filed August 26, 1940. Lloyd S. Payne, Clerk, by Sonya Worthy, Deputy.

The above entitled cause coming on to be heard this day in open Court, before the Honorable Roger Foley, Judge presiding in said court; Present Otis Baxter Williams, in person and by his attorney, I. S. Thompson, and the Court having before it all the files, pleadings and papers in this action and being fully advised in the premises and fully satisfied that this action has been regularly commenced; Finds that the plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than [Fol. 36] six weeks immediately preceding the commencement of this action in the manner prescribed by law; That an order was made directing the publication of the summons in this case and that thereafter, and on the 22nd day of July, 1940, the defendant was personally served with summons in the County of Caldwell, State of North Carolina; And that defendant's default has been entered for her failure to appear and answer plaintiff's complaint within the time allowed by law; And that defendant not having appeared for trial in said action, either in person or by attorney; That the Court has complete jurisdiction in the premises, both as to subject matter and to the parties to this action.

Now, Therefore, after hearing the witnesses sworn and examined in open court, and the said cause having been submitted and the Court being fully advised in the premises and the Court having fully considered all the evidence in the case, finds that all the averments and allegations contained in plaintiff's complaint are true as therein alleged;

That the plaintiff, Otis Baxter Williams, is without fault in the premises and is entitled to a Decree of Divorce from the defendant, Carrie Ora Williams, on the ground of extreme cruelty toward the plaintiff.

It is, Therefore, Ordered, Adjudged and Decreed that the bonds of matrimony now existing between the plaintiff and the defendant be, and the same are hereby dissolved, set aside and forever held naught; And the said parties are absolutely divorced and released from any and all marital obligations each to the other and are hereby restored to the status of single persons.

Done in open Court, this 26th day of August, 1940.

Roger Foley, District Judge.

[fol. 37] In the District Court of the Eighth Judicial District of the State of Nevada in and for Clark County

No. 10650

Otis Baxter Williams, Plaintiff,

vs.

Carrie Ora Williams, Defendant

Judgment Roll

Filed Aug. 28, 1940. Lloyd S. Payne, Clerk, by Sonya Worthy, Deputy.

I, the undersigned County Clerk and Ex-Officio Clerk of the District Court of the Eighth Judicial District in and for said County and State, do hereby certify that the foregoing is a true copy of the Judgment entered in the above entitled action recorded in Judgment Book 11 of said Court, at page 172; and I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of the District Court, this 11th day of August, 1940.

Lloyd S. Payne, Clerk, by Sonya Worthy, Deputy.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

PRAECIPE FOR DEFAULT

Filed Aug. 22, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy.

To the Clerk of the Above Entitled Court:

The defendant above named, Carrie Ora Williams, having been regularly served with process herein, and having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in default, you are [fol. 38] hereby requested and directed to enter the default of said defendant.

Dated this 22nd day of August, 1940.

I. S. Thompson, Attorney for Plaintiff.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

No. 10650

OTIS BAXTER WILLIAMS, Plaintiff,

vs.

CARRIE ORA WILLIAMS, Defendant

DEFAULT

Filed August 22, 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy.

It appearing from the files and records in the above entitled action that Carrie Ora Williams, defendant herein, was duly served with Summons on the 22nd day of July, A. D. 1940, at the County of Caldwell, State of North Carolina, and that more than 30 days, exclusive of the day of service, have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted the default of Carrie Ora Williams,

defendant herein, failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and seal of said Court, this 22nd day of August, 1940.

Lloyd S. Payne, Clerk, by Dolores Yturri, Deputy Clerk. (Seal.)

CLERK'S CERTIFICATE

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original: [fol. 39] Complaint, Affidavit for Publication of Summons, Order Directing Publication of Summons, Summons, Decree of Divorce, Judgment Roll, Praecipe for Default and Default, together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and annexed the seal of the District Court of the Eighth Judicial District of the State of Nevada in and for the County of Clark, this 12th day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District, in and for the County of Clark. (Seal.)

JUDGE'S CERTIFICATE TO CLERK

STATE OF NEVADA,
County of Clark, ss:

I, Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada,

and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such Clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In witness whereof, I have hereunto set my hand and in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 12th day of Novem-
[fol. 40] ber, A. D., 1940.

Roger Foley, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

CLERK'S CERTIFICATE TO JUDGE

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which court is a court of Record, having a seal, which is annexed hereto), do hereby certify that Roger Foley, whose name is subscribed to the foregoing certificate of due attestation was; at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of attestation is genuine.

In witness whereof, I have hereunto set my hand and annexed the seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 12th day of November, 1940.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the State of Nevada, in and for the County of Clark. (Seal.)

DEFENDANT'S EXHIBIT NO. 1

Addressee side:

I. S. Thompson
Attorney-at-Law
Rooms 5 & 6 Griffith Bldg.
Las Vegas,
Nevada.

[fol. 41] Reverse side:

Dear Sir:

Upon receipt of the original appearance, I will sign the same.

Signed: Thomas Hendrix.

Defendants Rest.

ORDER DENYING MOTION FOR NONSUIT

At the close of all the evidence the defendants and each of them renew their motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them except.

Exception No. 4.

IN SUPERIOR COURT OF CALDWELL COUNTY

JUDGE'S CHARGE TO JURY

Gentlemen of the jury: O. B. Williams and Lillie Shaver Hendrix are indicted in a bill of indictment charging them with having unlawfully, wilfully and feloniously married, alleging that they were married to each other in the City of Las Vegas in the State of Nevada, and thereafter returned to the State of North Carolina and did live together and cohabit together in the said State of North Carolina and in Caldwell County, the said O. B. Williams having a living wife, one Mrs. O. B. Williams, living in Caldwell County, North Carolina, at the time of said marriage to Lillie Shaver Hendrix and the said Lillie Shaver Hendrix having a living husband, one Tom Hendrix,

living in Caldwell County, North Carolina, at the time of her marriage to the said O. B. Williams.

Gentlemen of the jury, I shall not recapitulate the testimony, without objection. You gentlemen are the sole tryers of the facts that you will render your verdict upon the testimony and the evidence that has been offered, and upon your recollection as to what that testimony and that evidence is. The testimony is the spoken words of the witnesses. The evidence is the documentary matter offered into the record into the Court.

If counsel for the State or for the defendant, or if the Court should misquote any part of the testimony, you will [fol. 42] ignore that and rely upon your own recollection of the facts before you.

The State of North Carolina contends, and the defendants have offered documentary evidence into the record to the effect that the defendants obtained a decree in a court in the State of Nevada, which decree the State contends, insofar as it permits or authorizes the defendants to live together as man and wife in the State of North Carolina, is void; whereas the defendants contend that it is a valid divorce, not alone in the State of Nevada, but likewise in the State of North Carolina.

(A) The State contends that these defendants each has a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second marriage or purported marriage contract. That the feme defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina, that is, Mrs. O. B. Williams and Mr. Hendrix. That neither of these persons, to-wit, Mrs. Williams and Mr. Hendrix, personally or by attorney, made any appearance in the courts of Nevada and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada not to establish a bona fide residence, but solely for the purpose of taking advantage of the laws of that State and obtain a divorce through fraud upon that court. (B)

The defendants and each of them object and except to that portion of charge embraced within the letters (A) to (B).

Exception No. 5.

The burden is upon the State to satisfy you beyond a reasonable doubt as to the guilt of each defendant. You may convict one or both. When the Court instructs you that the burden is upon the State to satisfy you beyond a [fol. 43] reasonable doubt as to the defendants' guilt it does not mean to imply that your minds must be relieved of every whimsical, fanciful or imaginary doubt. It means exactly what that plain language says, that your minds must be made up to a moral certainty that O. B. Williams is guilty and that Mrs. Hendrix is guilty, and if you have a reasonable doubt as to either or both defendants, return for your verdict Not Guilty as to such defendant or defendants as to whose guilt you may have a reasonable doubt.

The defendants, under the laws of this State are presumed to be innocent. Every defendant is presumed to be innocent. The character evidence offered in behalf of the defendants is substantive evidence going directly to their guilt or innocence. They have elected not to go upon the witness stand, and there being no burden of proof upon them to show their innocence, but on the contrary upon the State to show beyond a reasonable doubt that they or either of them are guilty, the Court instructs you, as the law requires it to do, that you cannot and shall not consider that to their prejudice.

The defendants and each of them insists that upon a consideration of all of the facts that you should have a reasonable doubt as to their guilt and return for each of them a verdict of not guilty.

The defendants and each of them contend and insist that from the evidence that has been offered in its entirety, that you cannot find beyond a reasonable doubt that there has been cohabitation between the male and the female defendants.

Upon that point the State of North Carolina insists that their relationship as evidenced by the testimony offered on behalf of the State details a set of circumstances which you should accept as facts beyond a reasonable doubt, [fol. 44] and that you should conclude from that testimony that this male defendant and this female defendant not alone have lived together, gone to church together, gone to the store together and visited their neighbors together,

but they have lived together in the same house, in the relationship of man and wife, involving all of its marital rights, claims, obligations and physical and sexual contacts. The defendants insist that there is no evidence from which you should so conclude beyond a reasonable doubt.

The defendants insist they are people of good character and, being people of good character, would not commit a crime that in law amounts to a felony. That, being of good character, they are less likely to commit a crime than people of bad character.

The defendants insist that there was service as indicated by the evidence offered, which in law constitutes an appearance on behalf of the defendants and each of them, and gave jurisdiction to the Court in the State of Nevada, and with respect to the law involved regarding that subject, the Court will later instruct you.

From all of the evidence the defendants and each of them contend and insist that you should have a reasonable doubt, bearing in mind their presumption of innocence, and should for your verdict render one as to each of them of Not Guilty.

(C) Gentlemen of the jury, the Court charges you as a matter of law that service by publication in the State of Nevada, as indicated by the documentary evidence, does not give to the State of Nevada jurisdiction to grant a divorce to a married person that would authorize and validate a second marriage in the State of North Carolina. (D)

Defendants and each of them object and except to that portion of the Court's charge embraced within the letters (C) to (D).

Exception No. 6.

[fol. 45] (E) I read to you the following syllabus from Book 203, North Carolina Reports, reading verbatim from Syllabus 3, at page 533: "Divorce of another State based upon service by publication on resident of this State is not valid here." (F)

The defendants and each of them object and except to that portion of charge embraced within the letters (E) to (F).

Exception No. 7.

(G) "Where a husband domiciled in another State obtains a decree of absolute divorce from his wife domiciled in

this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other State (that is, by putting in the newspaper notifying the defendant and the public that an application is made, is being made for divorce), and in which the wife does not appear in person or by attorney, the decree of divorce based upon such service is not valid in this State." And in the instant case the State of North Carolina alleges and insists that neither the wife of the male defendant here in North Carolina, nor the husband of the female defendant, made a personal appearance in that court, nor did they, the State insists, make any appearance by attorney or have anyone to represent them, or make any appearance otherwise. (H)

The defendants and each of them object and except to that portion of charge embraced within the letters (G) to (H).

Exception No. 8.

"And an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage. The distinction is noted where both the parties are residents of such other States and its Courts have jurisdiction of both parties."

(I) I have read this verbatim, Syllabus 3 from Pridgen v. Pridgen, in 203 N. C. Reports, which is directly upon the subject. The case was tried by Judge Barnhill, at present [fol. 46] an Associate Justice of the Supreme Court of North Carolina, at that time a Superior Court Judge, and, incidentally, one of the greatest lawyers that this State has ever produced. The opinion is written by Judge Adams, another grand lawyer who has since gone to his reward. (J)

The defendants and each of them object and except to that portion of charge embraced within the letters (I) to (J).

Exception No. 9.

The syllabus needs no paraphrasing. It speaks for itself and I have read it verbatim from page 533.

(K) The defendants offered a card in evidence, and with respect to that card the Court charges you, gentlemen of the jury, that the card indicated or agreed to do certain things, but the card within itself, in law, does not constitute a

personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the papers were sent to him, that would have constituted a personal appearance, but my promising to make a personal appearance by attorney does not constitute one. It takes more than that. Suppose I want to make an appearance in the State of Nevada. I may authorize it in writing or by attorney—some one get up and appear for me. The State insists that was not done in this case and the defendants that it was. It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of that promise. (L)

The defendants and each of them object and except to the portion of charge embraced within the letters (K) to (L).

Exception No. 10.

The State contends there was no such consummation or carrying out of the promise with respect to Mrs. Hendrix' husband. That these defendants recognized only the publication and did not themselves rely upon the signing of this card purporting to agree to do something in the future if [fol. 47] the papers —sent him, and the State contends that they were never served nor accepted.

All of this is subject matter for you to consider upon the question of guilt or innocence.

(M) The Court says as follows: "The decree of divorce based upon service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage." (N)

The defendants and each of them object and except to that portion of charge embraced within the letters (M) and (N).

Exception No. 11.

Then it notes the distinction where both parties are residents of the same State. That does not concern you here, because one of the parties was a resident of this State in this case and the other Nevada, and the question is whether or not their marriage in the State of Nevada is valid in the State of North Carolina under the facts and the law in this State, and if it is valid, then these defendants cannot

be held to be guilty of bigamous cohabitation, because if they were lawfully married as they contend and insist they were, and that marriage was with jurisdiction sufficient to make it valid in North Carolina, then they have the legal right to live together as man and wife and cohabit and perform all of the other marital rights without hindrance on the part of the law.

(O) The State insists under the facts and the law that they have no such right. That in truth and in fact they are not legally man and wife, and that they have been conducting themselves and living as such, and asks you so to find beyond a reasonable doubt. (P)

The defendants and each of them object and except to the portion of charge embraced within the letters (O) to (P).

Exception No. 12.

[fol. 48] (Q.) Before I forget it I want to call your attention to the alleged service by the Sheriff of Caldwell County upon Mrs. Williams. The defendants insist that she was served with process. To make you a party defendant to a lawsuit started and instituted for a divorce in this Court, the Superior Court of Caldwell County, a complaint is filed in the office of the Clerk of the Superior Court, a summons, a document in writing indicating upon its face what it is, is attached thereto, signed by the Clerk of the Superior Court, given to the Sheriff or his deputy or constable, an officer clothed with the power of serving process. This is taken and served upon the defendant, and until that is done or the defendant voluntarily comes into Court in person or by attorney, the Court has no jurisdiction of that defendant. That is, here in North Carolina. No man can come into this Court and prepare a complaint and proceed to obtain a judgment of the Court upon it without serving such process upon the defendant, and it properly served as the law provides, because it involves the rights, liberties and privileges of the State citizenship. (R)

The defendants and each of them object and except to that portion of the charge embraced within the letters (Q) to (R).

Exception No. 13.

The defendants contend that under the direction and authority of the Court in the State of Nevada, a copy of the

complaint, the proceedings in question were filed or supplied to the Sheriff (there is no evidence whether they were mailed or not), but supplied or furnished the sheriff of this county, and that the sheriff of this county served upon Mrs. Williams. The defendants insist that was valid and lawful service, and the State contends to the contrary.

(S) Whereupon, the Court charges you as a matter of law that the purported or attempted service of the Sheriff of Caldwell County upon the defendant's wife, Mrs. Wil- [fol. 49] liams, of the pleadings and papers to this State from the State of Nevada had no effect in law, because the Sheriff has no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the Court so instructs you. (T)

The defendants and each of them object and except to that portion of charge embraced within the letters (S) to (T).

Exception No. 14.

(U) Our Supreme Court says, in State v. Herron, 175 N. C., page 754, Syllabus 3: Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide of his residence for the required time, but not beyond a reasonable doubt, and the same would apply as to bigamous cohabitation and assumption of the marital relation between a man and a woman who are themselves married at the time, and if they so associate themselves together under a contract alleged to be a marital contract in some foreign State being relied upon for divorce, that Court must have had the requisite jurisdiction to grant the divorce or divorces in question. (V)

The defendants and each of them object and except to that portion of charge embraced within the letters (U) to (V).

Exception No. 15.

I will read that again. (Here the Court again reads from 175 N. C., page 754, Syllabus 3). In other words, he is not

called upon to satisfy the jury beyond a reasonable doubt, nor by the greater weight of the evidence, but to satisfy the minds of the jury.

Gentlemen, I want to read for you Consolidated Statutes 4342. I will read it all for your benefit:

[fol. 50] If any person being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail for a term not less than four months nor more than ten years. Any such offender may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage shall be punishable as bigamous if contracted in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. I stop here, gentlemen, to observe that the charge here is that the defendants cohabited in the State of North Carolina, and as to that, if they did and you so find beyond a reasonable doubt that they did cohabit within the State of North Carolina, it is immaterial whether it was in Avery County or Caldwell County, if they did it at all, and you so find beyond a reasonable doubt.

Nothing contained in this section shall extend to any person marrying a second time, whose husband and wife shall have been continuously absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time (that does not apply, but I will read all that paragraph); "nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction."

So that raises the question I am submitting to you for you to decide. Under all of the evidence the State contends and insists that you should return a verdict of guilty as to [fol. 51] both defendants, and the defendants and each of them contends and insists that your verdict as to each of them should be not guilty. The State contends and insists

that under all of the evidence and the law in the case, that your verdict should be guilty as to both defendants.

You will try this case without bias and without the prejudice and without considering the result of your verdict. Something has been said to you about punishment. That is none of your concern. That is a burden that devolves upon the Court. You will pass upon the facts and say whether the defendants are guilty or not guilty, in the light of the instructions given to you by the Court and the law as given to you by the Court, and the facts as you find them to be, without regard to the consequences thereof.

You may retire and make up your verdict.

IN SUPERIOR COURT OF CALDWELL COUNTY

VERDICT

Verdict of guilty by the jury as to each defendant.

IN SUPERIOR COURT OF CALDWELL COUNTY

JUDGMENT

Upon the verdict as rendered by the jury, the judgment of the Court as to the male defendant, O. B. Williams, is that the said male defendant be confined in the State Prison at Raleigh, North Carolina, for not less than three nor more than ten years, and be assigned to hard labor as provided by law.

As to the female defendant, Lillie Shaver Hendrix, the judgment of the Court is that she be confined in the State Prison at Raleigh, North Carolina, for not less than three nor more than five years and assigned to perform such labor as provided for women prisoners by law.

IN SUPERIOR COURT OF CALDWELL COUNTY

APPEAL ENTRIES

Upon the coming in of the verdict the defendants and each of them, in apt time, move the Court to set the verdict

aside as being against the greater weight of the evidence [fol. 52] and the law in the case, and for errors assigned and to be assigned. Motion denied in each case as to each defendant, and the defendants and each of them except.

To the judgment the defendants and each of them except in open Court and appeal to the Supreme Court of North Carolina. Notice of appeal given in open Court. Further notice waived.

The defendants, appellants, shall be allowed 60 days in which to make up and serve statement of case on appeal upon the State's counsel, and the State's counsel shall be allowed 60 days after the service of the case in which to serve counter-case or file exceptions. Appeal bond in each case is fixed by the Court at $150.00. Appearance bond in each case is fixed at $2500.00, to be justified and approved by the Sheriff of Caldwell County.

IN SUPERIOR COURT OF CALDWELL COUNTY

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

1. The defendants and each of them assign as error the following question and answer:

Q. Do you know whether they are living together and have been living together for sometime in Pineola as husband and wife?

A. Yes.

As shown by Exception No. 1 (R. p. 8).

2. The defendants and each of them assign as error the question and answer as follows:

Q. Have they?

A. Yes.

As shown by Exception No. 2 (R. p. 8).

3. The defendants and each of them assign as error the Court's failure to allow the defendants' motions for judgment of nonsuit at the close of the State's evidence, as follows:

At the close of the State's evidence the defendants and each of them move for judgment of nonsuit. Motion de-

nied as to each defendant and the defendants and each of them except.

As shown by Exception No. 3 (R. p. 9).

[fol. 53] 4. The defendants and each of them assign as error the refusal of the Court to allow their motions for judgment as of nonsuit at the close of all the evidence, as follows:

At the close of all the evidence the defendants and each of them renew the motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them except.

As shown by Exception No. 4 (R. p. 41).

5. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (A) to (B), which is as follows:

(A) The State contends that these defendants each has a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second attempted marriage or purported marriage contract. That the feme defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina, that is, Mrs. O. B. Williams and Mr. Hendrix. That neither of these persons, to-wit, Mrs. Williams and Mr. Hendrix, personally or by attorney, made any appearance in the Courts of Nevada, and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada not to establish a bona fide residence, but solely for the purpose of taking advantage of the laws of that State and obtain a divorce through fraud upon that Court. (B)

As shown by Exception No. 5 (R. p. 42).

6. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (C) to (D), which is as follows:

(C) Gentlemen of the jury, the Court charges you as a matter of law that service by publication in the State of [fol. 54] Nevada, as indicated by the documentary evidence,

does not give to the State of Nevada jurisdiction to grant a divorce to a married person that would authorize and validate a second marriage in the State of North Carolina. (D)

As shown by Exception No. 6 (R. p. 44).

7. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (E) to (F), which is as follows:

(E) I read to you the following syllabus from Book 203, N. C. Reports, reading verbatim from Syllabus 3, page 533: "Divorce of another State based upon service by publication on residents of this State is not valid here. (F)

As shown by Exception No. 7 (R. p. 45).

8. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (G) to (H), which is as follows:

(G) Where the husband domiciled in another State obtains a decree of absolute divorce from his wife domiciled in this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other State (that is, by putting in the newspaper notifying the defendant and the public that application is made, is being made for divorce), and in which the wife does not appear in person or by attorney, the decree of divorce based upon such service is not valid in this State. And in the instant case the State of North Carolina alleges and insists that neither the wife of the male defendant here in North Carolina, nor the husband of the female defendant, made a personal appearance in that Court, nor did they, the State insists, make any appearance by attorney or have anyone to represent them, or make any appearance otherwise. (H)

As shown by Exception No. 8 (R. p. 45).

9. The defendants and each of them assign as error that [fol. 55] portion of the Court's charge embraced within the letters (I) to (J), which is as follows:

(I) I have read this verbatim, Syllabus 3 from Pridgen v. Pridgen, in 203 N. C. Reports, which is directly upon the subject. This case was tried by Judge Barnhill, at

present an Associate Justice of the Supreme Court of North Carolina, at that time a Superior Court Judge, and incidentally one of the greatest lawyers that this State has ever produced. The opinion is written by Judge Adams, another great lawyer who has since gone to his reward. (J)

As shown by Exception No. 9 (R. pp. 45-46).

10. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (K) to (L), which is as follows:

(K) The defendants offered a card as evidence, and with respect to that card the Court charges you, gentlemen of the jury, that the card indicated or agreed to do certain things, but the card within itself, in law, does not constitute a personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the papers were sent to him, that would have constituted a personal appearance, but my promising to make a personal appearance by attorney does not constitute one. It takes more than that. Suppose I want to make an appearance in the State of Nevada. I may authorize it in writing or by attorney—some one get up and appear for me. The State insists that it was not done in this case and the defendants that it was. It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of that promise. (L)

As shown by Exception No. 10 (R. p. 46).

11. The defendants and each of them assign as error that portion of charge embraced within the letters (M) to (N), which is as follows:

[fol. 56] (M) The Court says as follows: "The decree of divorce based upon such service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage." (N)

As shown by Exception No. 11 (R. p. 47).

12. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (O) to (P), which is as follows:

(O) The State insists under the facts and the law that they have no such right. "That in truth and in fact they

are not legally man and wife, and that they have been conducting themselves and living as such, and asks you so to find beyond a reasonable doubt." (P)

As shown by Exception No. 12 (R. p. 47).

13. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (Q) to (R), which is as follows:

(Q) Before I forget it I want to call your attention to the alleged service by the Sheriff of Caldwell County upon Mrs. Williams. The defendants insist that she was served with process. To make you a party defendant to a lawsuit started and instituted for a divorce in this Court, the Superior Court of Caldwell County, a complaint is filed in the office of the Clerk of the Superior Court, a summons, a document in writing indicating upon its face what it is, is attached thereto, signed by the Clerk of the Superior Court, given to the Sheriff or his deputy or constable, an officer clothed with the power of serving process. This is taken and served upon the defendant, and until that is done, or the defendant voluntarily comes into court in person or by attorney, the Court has no jurisdiction of that defendant, that is here in North Carolina. No man can come into this Court and prepare a complaint and proceed to obtain a [fol. 57] judgment of the Court upon it without serving such process upon the defendant, and it properly served as the law provides, because it involves the rights, liberties and privileges of the State citizenship. (R)

As shown by Exception No. 13 (R. p. 48).

14. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (S) to (T), which is as follows:

(S) Whereupon, the Court charges you as a matter of law that the purported or attempted service of the Sheriff of Caldwell County upon the defendant's wife, Mrs. Williams, of the pleading and papers to this State from the State of Nevada had no effect in law, because the Sheriff had no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the Court so instructs you. (T)

As shown by Exception No. 14 (R. pp. 48-49).

15. The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (U) to (V), which is as follows:

(U) Our Supreme Court says, in State v. Herron, 175 N. C., page 754, Syllabus 3: Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide of his residence for the required time, but not beyond a reasonable doubt, and the same would apply as to bigamous cohabitation and assumption of the marital relation between a man and a woman who are themselves married at the time, and if they so associate themselves together under a contract alleged to be a marital contract in some foreign state being relied upon for a divorce, that Court must have had the [fol. 58] requisite jurisdiction to grant the divorce or divorces in question. (V)

As shown by Exception No. 15 (R. p. 49).

The defendants and each of them except and assign as error the charge of the Court as a whole, for the reason that the charge states the law incorrectly, and for the further reason that the Court charged the jury upon matters of law concerning which there was no evidence with respect thereto.

Service of the record of the foregoing case on appeal to the Supreme Court of North Carolina is hereby accepted and receipt of a copy of the record of said case on appeal is hereby acknowledged.

This the 4th day of April, 1941.

L. S. Spurling, Solicitor for the Sixteenth Judicial District.

RECITAL RE APPEAL BONDS

Appeal Bond for both defendants duly filed.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] IN SUPREME COURT OF NORTH CAROLINA

STATE

v.

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX

OPINION—Filed December 10, 1941

Appeal by defendants from Sink, J., and a jury, February-March Term, 1941, Caldwell Superior Court. *No Error.*

The following bill of indictment was sent to the grand jury, who returned a true bill:

"The jurors of the State, upon their oath, present: That O. B. Williams and Lillie Shaver Hendrix, late of the County of Caldwell, on the 4th day of October, in the year of our Lord One Thousand Nine Hundred and Forty, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did get married to each other in the City of Las Vegas in the State of Nevada, and thereafter returned to the State of North Carolina and did live together and cohabit together in the said State of North Carolina and in Caldwell County, the said O. B. Williams having a living wife, one Mrs. O. B. Williams, living in Caldwell County, North Carolina, at the time of his said marriage to Lillie Shaver Hendrix and the said Lillie Shaver Hendrix having a living husband, one Tom Hendrix, living in Caldwell County, North Carolina, at the time of her marriage to the said O. B. Williams, against the form of the statute in such case made and provided and against the peace and dignity of the State. L. S. Spurling, Solicitor. Returned a True Bill, A. S. Nelson, Foreman Grand Jury."

The defendants entered a plea of "Not guilty." Upon the trial the jury returned the verdict: "Upon their oaths, say that said O. B. Williams and Lillie Shaver Hendrix are guilty as charged in the Bill of Indictment."

The State's evidence: Mrs. Carrie Williams (Mrs. O. B. Williams) testified: "That she was a Wyke before her marriage; that she now lives about four miles east of Granite [fol. 60] Falls, Caldwell County, North Carolina; that she married O. B. Williams on May 30, 1916, in Caldwell County;

that she and Williams lived together as husband and wife between 23 and 24 years, or until about May 7, 1940; that they had reared a family of four children; that they had not lived together since May 7, 1940; that she had no brought any action for divorce against O. B. Williams." Cross-examination: "I happen to have a paper that the Sheriff served on me here. I read it."

Tom (Thos. George) Hendrix testified: "I live in this county. I was married to Lillie Shaver Hendrix about twenty years ago. We lived as husband and wife at Saw Mills in this county until May, 1940. We have not lived together since that time. I have brought no divorce proceedings against my wife." Cross-examination: Witness admits his signature on a card. The card is as follows: Address side: "I. S. Thompson, Attorney-at-Law Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada." Reverse side: "Dear Sir: Upon receipt of the original appearance, I will sign same. (signed) Thomas Hendrix."

The State introduced a Certificate of Marriage, by the County Recorder, David Farnsworth, dated October 8, 1940, between the defendants in Clark County, Nevada: "State of Nevada, County of Clark, ss. This is to Certify That the undersigned, C. H. Sloan, did, on the 4th day of October, A. D., 1940, join in lawful wedlock O. B. Williams of Las Vegas, State of Nevada, and Lillie Esther Shaver of Las Vegas, State of Nevada, with their mutual consent in the presence of Mrs. Jack Pembroke and Mrs. Charles H. Sloan, who were witnesses. C. H. Sloan, Baptist Minister, Mrs. Jack Pembroke, Mrs. Charles H. Sloan, witnesses. Recorded at the request of C. H. Sloan. Filed Oct. 8, 1940. David Farnsworth, County Recorder." This was duly authenticated.

I. M. Vance, witness for the State, testified, in part: "I have seen Mr. Williams and Mrs. Hendrix there at their home. * * * I have seen them together about eight months. I couldn't say that they cook and eat at their home. They live there."

[fol. 61] T. A. Thompson testified, in part: "I live in Pineola, Avery County. I know Mr. Williams and have known him since some time in February. I met them in Pineola Baptist Church. Q. Do you know whether they are living together and have been living together for some time in Pineola as husband and wife? Ans: Yes. Q. Have they? Ans: Yes. To the best of my knowledge they have

lived together since about August or September, I wouldn't say exactly."

R. G. Buchanan testified, in part: "I live in Pineola, Avery County. I know the two defendants, Mr. Williams and the woman, and have known them for about eight months. They live in Pineola as man and wife." (Cross-examination). I have known them something like six or eight months. I have been to their home twice. I have known their general reputation since they have been in the community, and it is good."

The State rested. Motion by defendants for judgment of nonsuit. Motion overruled. Exception by defendants.

Defendants' Evidence: Exemplified copy of the divorce proceedings from the Eighth Judicial District of the Court of the State of Nevada in and for Clark County in an action entitled "Lillie Esther Hendrix v. Thomas George Hendrix". The complaint alleges:

"The plaintiff complains of the defendant and for cause of action alleges:

1. That on June 27th, 1920, in Icard, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been and are now wife and husband.

II. That plaintiff is now and has been a resident of the State of Nevada for a period of more than six weeks immediately preceding the commencement of this action; she has been and now is, a resident of the County of Clark, State of Nevada.

III. That there is no issue of said marriage.

IV. That the defendant has willfully neglected for the period of over one year immediately preceding the commencement of this action to provide plaintiff with the common necessities of life, although having the ability to do so; that such neglect was and is not the result of poverty [fol. 62] on the part of the defendant, which he could not avoid by ordinary industry.

For a second and separate cause of action against the defendant, plaintiff alleges:

V. That the allegations set forth in paragraphs I, II and III, of plaintiff's first cause of action are true and are hereby made a part of this cause of action.

VI. That during the term of said marriage, the defendant has been guilty of extreme mental cruelty toward this plaintiff by his words, actions and conduct; and plaintiff therefore alleges, that during the term of said married life the defendant has been guilty of extreme cruelty toward the plaintiff.

Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons. L. S. Thompson, Attorney for plaintiff." Subscribed and sworn to before L. S. Thompson, Notary Public, seal attached on June 26, 1940.

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. No. 10651. Lillie Esther Hendrix, plaintiff, vs. Thomas George Hendrix, defendant —Affidavit for Publication of Summons. Filed July 22, 1940. Lloyd S. Payne, Clerk, By Helen Scott, Deputy." The affidavit, among other things, says: "That the defendant, Thomas George Hendrix, resides outside the State of Nevada, to-wit, at 391 Fuller Street, Akron, Ohio, and that he is not now and cannot be found in the State of Nevada and that defendant's present place of residence is 391 Fuller Street, Akron, Ohio." Subscribed and sworn to before L. S. Thompson, Notary Public, seal attached July 20, 1940.

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. No. 10651. Lillie Esther Hendrix, plaintiff, vs. Thomas George Hendrix, defendant —Order Directing Publication of Summons. Filed July 22, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy Clerk." Then is set forth the Order, signed by Roger Foley, District Judge—Summons be by publication: "On [fol. 63] motion of L. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Thomas George Hendrix, by publication thereof in the Las Vegas Evening Review Journal, a newspaper published in the City of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give notice to said defendant; that said publication be made for a period of four weeks and at least once a week during said time. And it further in like manner satisfactorily appearing to me that the residence

of said defendant is known as 391 Fuller Street, Akron, Ohio, and that his post office address is 391 Fuller Street, Akron, Ohio; it is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Post Office at the City of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at his said post office address. Dated this 22 day of July, 1940."

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. Lillie Esther Hendrix, plaintiff, vs. Thomas George Hendrix, defendant—Summons." Then is set forth the summons, duly signed, dated 26th day of June, 1940. "Returned and filed October 4, 1940. Lloyd S. Payne, Clerk, Dolores Yturri, Deputy. I. S. Thompson, Attorney for Plaintiff, Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada—13-1575. Sheriff's Return. Received at Sheriff's Office, Summit County, July 24th, 9:19 A. M., 1940." "Affidavit of Mailing Copy of Summons and Complaint—Filed Oct. 4, 1940. Lloyd S. Payne, Clerk. By Dolores Yturri, Deputy."

Affidavit made by George W. Thompson (same last name as the Attorney), setting forth the publication and the mailing of the copy of Summons and Complaint, to Akron, Ohio. "Subscribed and sworn to before me, this 10th day of August, 1940. I. S. Thompson, Notary Public. (Attorney in the case)."

Affidavit of foreman of newspaper: "That the attached was continuously published in said newspaper for a period of five weeks from August 7, 1940, to Sept. 4th, 1940, inclusive, being the issues of said newspaper was regularly [fol. 64] issued and circulated on each of the dates above named."

"In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. No. 10651—Lillie Esther Hendrix, plaintiff, vs. Thomas George Hendrix, defendant. Decree of Divorce. Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

The above entitled cause coming on regularly for hearing this day, in open Court, before the Honorable Roger Foley Judge of said Court, presiding; Present Lillie Esther Hendrix, plaintiff, in person and by her attorney, I. S. Thompson, the defendant not appearing and the Court having before it all the files, pleadings and papers in the action and being fully advised in the premises, finds that this action has

been regularly commenced; and that the plaintiff is now and has been a bona fide resident of the County of Clark, State of Nevada for more than six weeks immediately preceding the commencement of this action; that the defendant has been duly and regularly served with summons in this action in the manner prescribed by law and the order of this Court; that after the order was made directing the publication of the summons, the plaintiff used every effort to locate the defendant in order to serve the summons upon him personally but was unable to do so because of his dodging service; that the service of summons was made by publication in The Las Vegas Evening Review Journal, for a period of four weeks and at least once a week during said time; and the default of the defendant has been duly entered for failure to answer plaintiff's complaint within the time allowed by law; and the defendant not having appeared for trial of said action either in person or by attorney and that the Court has complete jurisdiction of the matter both as to the subject matter and the parties to the action. Now, Therefore, after hearing the witnesses sworn and examined in open Court and the said cause having been submitted and the Court being fully advised in the premises and having fully considered all the evidence in the case, finds that all the averments contained in plaintiff's complaint are true as therein alleged; that the plaintiff, Lillie Esther Hendrix, is [fol. 65] without fault in the premises, and is entitled to a Decree of Divorce from the defendant, Thomas George Hendrix, on the grounds of his willful neglect and extreme cruelty toward the plaintiff. It is, Therefore, Ordered, Adjudged and Decreed that a contract of marriage now existing between the plaintiff, Lillie Esther Hendrix, and the defendant, Thomas George Hendrix, be and the same is hereby dissolved, set aside and forever held at naught; and that the said parties are absolutely divorced and released from any and all marital obligations each to the other, and are hereby restored to the status of single persons. Done in open Court, this 4th day of October, 1940. Roger Foley, Dist. Judge."

Then comes the Judgment Roll. Then the "Praecipe for Default", signed by I. S. Thompson, Attorney for plaintiff. Then the "Default Judgment": "Witness my hand and seal of said Court, this 4th day of October, A. D., 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Dep. Clerk. Seal."

Affidavit as to residence of plaintiff, in part: "That on said last named date Lillie Esther Hendrix, the plaintiff above named, came there to live, rented a room and is still living there; that said Lillie Esther Hendrix was present every day, at said place, from [illegible]date she came there, May 15, 1940, up to and including Ju[illegible]26, 1940. Lillie Roesselet. Subscribed to and sworn before me, this 16th day of September, 1940. I. S. Thompson, Notary Public. Seal. Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy."

Affidavit of plaintiff "Of non military service of defendar —filed Oct. 4, 1940, signed Lillie Esther Hendrix. Subscribed and sworn to before me, this 1st day of October, 1940. I. S. Thompson, Notary Public—Seal."

Then comes the testimony of plaintiff before Roger Foley, Dist. Judge, confirming what she had sworn to in her Complaint and as to her residence. "Q. Where do you reside? Ans: Las Vegas, Nevada. Q. Las Vegas, Clark County, Nevada? Ans: Yes. Q. You filed your complaint on June 26, 1940; had you re-ided here a full six weeks prior to that time? Ans: Yes. Q. When did you come to Clark County, [fol. 66] Nevada? Ans: May 15, 1940."

O. B. William was called as a witness for plaintiff: (By Mr. Thompson) "Q. Where were you living on the 15th day of May, 1940? Ans: At the Alamo Court, Las Vegas. Q. When did you first see her at that Court? Ans: May 15, 1940. Q. So that she lived there at that Alamo Court until the day she filed her complaint? Ans: Yes, sir. Q. You saw her every day? Ans: Yes, sir."

Defendants' Exhibit No. 2. (Exemplified copy of the divorce proceedings in the Eighth Judicial Court of the State of Nevada, in and for Clark County, and that certain action entitled: Otis Baxter Williams v. Carrie Ora Williams): In the Eighth Judicial Court of the State of Nevada in and for Clark County. No. 10650. Otis Baxter Williams, plaintiff, vs. Carrie Ora Williams, defendant. Complaint. Filed June 26, 1940. Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy. The plaintiff complains of the defendant and for cause of action alleges:

1. That in the month of November, 1916, in Granite Falls, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been, and are now, husband and wife.

2. That the plaintiff is now and has been a resident of the State of Nevada for the period of more than six weeks immediately preceding the commencement of this action.

That for more than six weeks immediately preceding the commencement of this action he has been, and is now, a resident of the County of Clark, State of Nevada.

3. That during the term of said marriage the defendant has been guilty of extreme cruelty toward this plaintiff, by her words, actions and conduct;

And plaintiff, therefore, alleges that during the term of said married life the defendant has been guilty of extreme cruelty toward this plaintiff.

Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between [fol. 67] the plaintiff and the defendant, and restoring said parties to the status of single persons. I. S. Thompson, Attorney for plaintiff." Subscribed and sworn to before I. S. Thompson, Notary Public, June 26, 1940.

Then follows: (a) Affidavit for Publication of Summons, filed July 18, 1940, subscribed and sworn to July 16, 1940, before I. S. Thompson, Notary Public, seal attached; (b) Order Directing Publication, signed by Roger Foley, District Judge, dated July 18, 1940; (c) Summons, dated June 26, 1940; (d) Affidavit of Sheriff.

"Sheriff's Return: State of Nevada, County of Clark—ss. I, J. F. Parlier, the duly elected, qualified and acting Sheriff of said County and State, (error) do hereby certify and return that I received the within summons on the 18th day of July, A. D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A. D., 1940, at Granite Falls, County of Caldwell, North Carolina, by then and there delivering to her, the said defendant, personally a copy of said summons attached to a certified copy of the complaint in the within entitled action. Dated this 22nd day of July, A. D., 1940. J. F. Parlier, Sheriff Caldwell County, State of North Carolina." Certificate as to being Sheriff, by Clerk Superior Court of Caldwell County, N. C.

(e) Decree of Divorce, signed by Roger Foley, District Judge, August 26, 1940. (f) Then comes Judgment Roll; (g) Praecipe for Default; (h) Default, and certain certificates. Defendants rest.

At the close of all the evidence the defendants and each of them renewed their motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them excepted.

The Judgment of the Court below is as follows: "Upon the verdict as rendered by the jury, the judgment of the Court as to the male defendant, O. B. Williams, is that the said male defendant be confined in the State Prison at Raleigh, North Carolina; for not less than three nor more than ten years, and be assigned to hard labor as provided by law. As to the female defendant, Lillie Shaver Hendrix, [fol. 68] the judgment of the Court is that she be confined in the State Prison at Raleigh, North Carolina, for not less than three nor more than five years and assigned to perform such labor as provided for women prisoners by law."

Upon the coming in of the verdict the defendants and each of them, in apt time, moved that the Court set the verdict aside as being against the greater weight of the evidence and the law in the case, and for errors assigned and to be assigned. Motion denied in each case as to each defendant, and the defendants and each of them excepted, and assigned error. To the Judgment of the Court defendants and each of them excepted, assigned error and appealed to the Supreme Court. The defendants made other exceptions and assignments of error and appealed to the Supreme Court. The material ones will be set forth in the opinion.

The record of exemplification introduced by defendants is not set forth in proper order; therefore the facts, as we have set them forth, follow the order of the exemplification.

Attorney General McMullan and Asst. Attorneys General Bruton and Patton for the State. Pritchett & Strickland and George Hovey for Defendants.

CLARKSON, J.:

At the close of the State's evidence, and at the conclusion of all the evidence, the defendants made motion in the Court below for judgment of nonsuit. N. C. Code, 1939 (Michie), Sec. 4643. The Court below overruled these motions and in this we can see no error.

The defendants are indicted under N. C. Code, supra, Sec. 4342, which is as follows: "If any person being mar-

ried shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if [fol. 69] the offence had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past; and shall not have been known by such person to have been living within that time; nor to any person who at the time of said second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

At common law, the second marriage was always void and from the earliest history of England polygamy has been treated as an offense against society. It is considered as a crime against the marital relation rather than against the wife. Bigamy and polygamy are likewise crimes by the laws of all civilized and Christian countries.

Mr. Justice Waite said: "From that day (the date of the enactment of the bigamy statute in Virginia, 12 Hening's Stat. 691), to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." Reynolds v. United States, 98 U. S., 145 (165), 25 L. Ed., 244.

The defendants' exception and assignment of error to the following question and answer, elicited from the State's witness T. A. Thompson cannot be sustained: "Q. Do you know whether they are living together and have been living

together for sometime in Pineola as husband and wife? Ans: Yes. Q. Have they? Ans: Yes."

R. G. Buchanan, a witness for the State, later testified: [fol. 70] "I live in Pineola, Avery County. I know the two defendants, Mr. Williams and the woman, and have known them for about eight months. They live in Pineola as man and wife. (Cross-examination.) I have known them something like six or eight months. I have been to their home twice. I have known their general reputation since they have been in the community, and it is good." There was no exception or assignment of error made by defendants to this later testimony. In fact, the defendants' cross-examined the witness. This evidence was plenary to be submitted to the jury under the Bill of Indictment that defendants were living together in Avery County, North Carolina, as man and wife. They were tried in Caldwell County, North Carolina, but the statute, Sec. 4342, supra, permits this.

In Shelton v. R. R., 193 N. C., 670 (674), it is written: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost. Smith v. R. R., 163 N. C., 143; Tillett v. R. R., 166 N. C., 515; Beaver v. Fetter, 176 N. C., 334; Marshall v. Tel. Co., 181 N. C., 410." State v. Hudson, 218 N. C., 219 (230).

The defendants contend that they are protected under the proviso to 4342, supra: "Nothing contained in this section shall extend to any person marrying a second time . . . nor to any person who at the time of said second marriage shall have been lawfully divorced from the bond of the first marriage."

The defendants contend that the question involved is: "Can the Courts of North Carolina sustain a conviction upon an indictment charging bigamous cohabitation under Consolidated States, N. C. Code, section 4342, when the evidence shows that both of the defendants have been legally and properly divorced under the laws of a sister State?" We do not think from this record that the defendants can make the contention in this jurisdiction.

[fol. 71] *As to defendant O. B. Williams:* The evidence is to the effect that defendant O. B. Williams was married

to Carrie Ora (Wyke) Williams on May 10, 1916, in Caldwell County, N. C.; that they lived together as husband and wife between 23 and 24 years, or until about May 7, 1940. That they had reared a family of four children. That she had not brought any action for divorce against him. That she lives about four miles East of Granite Falls, Caldwell County, N. C. On June 26, 1940, O. B. Williams brought an action against Carrie Ora Williams, in Clark County, Nevada. The complaint alleges that they were married in Granite Falls, N. C., in the month of November, 1916, and are now husband and wife. That for a period of more than six weeks immediately preceding the commencement of this action, he has been and now is a resident of Clark County, Nevada. He alleges that his wife during the time of their marriage has been guilty of extreme cruelty towards him, by her words, actions and conduct. The plaintiff in that action prays judgment against the defendant dissolving the bonds of matrimony existing between them and restoring said parties to the status of single persons. This complaint was filed by I. S. Thompson, Attorney. It was subscribed and sworn to before I. S. Thompson, a Notary Public, on June 26, 1940, who attached his seal. The affidavit of Publication of Summons was filed on July 18, 1940. It was subscribed and sworn to before I. S. Thompson on July 16, 1940, who attached his seal of office. The Order directing Publication of Summons was made by Roger Foley, District Judge, on July 18, 1940. The Summons issued by the Clerk was dated June 26, 1940. Below was written "I. S. Thompson, Atty. for plaintiff." Summons return and filed August 22, 1940. The order for Publication of Summons and Complaint by Roger Foley, District Judge (1) by publication for a period of four weeks, (2) on defendant in North Carolina by mailing.

The following affidavit was filed: "I received the within summons on the 18th day of July, A. D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A. D., 1940, at Granite Falls, County of Caldwell, North Carolina, [fol. 72] by then and there delivering to her, the said defendant, personally, a copy of said summons attached to a certified copy of the complaint in the within entitled action. Dated this 22nd day of July, A. D., 1940. J. F. Parlier, Sheriff Caldwell County, State of North Carolina." Affidavit of Parlier, dated July 22, 1940, as to service of sum-

mons before F. H. Hoover, Clerk Superior Court of above State and County. Decree on August 26, 1940, by Roger Foley, District Judge—the same practically as the decree of Divorce heretofore set out in full which was granted Lillie Esther Hendrix. The only difference was to fit the facts as to the method of service. This action was numbered 10650.

Then comes the Judgment Roll, Praecipe for Default, signed by I. S. Thompson, Attorney for plaintiff. Then Default Order, signed by the Clerk, on August 26, 1940. Then certain certificates, not material.

As to defendant Lillie Shaver Hendrix: The evidence is to the effect that defendant, Lillie Shaver Hendrix was married to George Thomas Hendrix about 20 years ago (time of trial February-March Term, 1941), and lived in Caldwell County, N. C., as husband and wife until May, 1940. That he brought no action for divorce against her. That Lillie Shaver Hendrix (action entitled Lillie Esther Hendrix), as plaintiff, brought an action against George Thomas Hendrix on June 26, 1940, in Clark County, Nevada. The complaint alleges that they were married on June 27, 1920, in Icard, N. C., and are now husband and wife. That for a period of more than six weeks immediately preceding the commencement of this action, she has been and is now a resident of Clark County, Nevada. She alleges that her husband wilfully neglected, for over a year immediately preceding the action, to provide her with the common necessities of life, though able to do so and has been guilty of extreme mental cruelty towards her by words, action and conduct, and during the term of their married life has been guilty of extreme cruelty towards her. The plaintiff prayed judgment against the defendant dissolving the bonds of [fol. 73] matrimony existing between them, restoring said parties to the status of single persons. It was subscribed and sworn to before I. S. Thompson, a Notary Public, on June 26, 1940, who attached his seal. He was also her attorney.

The affidavit for Publication of Summons was filed July 22, 1940, subscribed and sworn to on July 20, 1940, before I. S. Thompson, Notary Public, attaching seal. The Order Directing Publication of Summons was made by Roger Foley, District Judge. The Summons issued by the Clerk was dated June 26, 1940, and below was written "I. S. Thompson, Attorney for plaintiff". Affidavit of Mailing

copy of Complaint to defendant at Akron, Ohio, setting forth certain facts, was signed by Geo. W. Thompson (the last name the same as the Attorney), not a party to the action, and subscribed and sworn to Aug. 10, 1940, before I. S. Thompson, Notary Public, attaching seal. Order Directing Publication of Summons was made by Roger Foley, July 22, 1940, and also service on defendant at Akron, Ohio—which was never served.

Decree of Divorce was filed October 4, 1940, by Roger Foley, District Judge. Then comes Judgment Roll; Praecipe for Default, signed by I. S. Thompson, Attorney for plaintiff; then Default Order, signed by the Clerk, Oct. 4, 1940. Then Affidavit of Lillie Roesselet, dated Sept. 16, 1940, as to plaintiff's residence from May 15, 1940 up to and including June 26, 1940. This was subscribed and sworn to Sept. 16, 1940, before I. S. Thompson, Notary Public, attaching seal, Attorney for plaintiff, and also testimony of O. B. Williams as to her residence. Then affidavit of non-military service of defendant, filed Oct. 4, 1940, signed by plaintiff and subscribed and sworn to before I. S. Thompson, Notary Public, seal attached. This action was numbered 10651.

In North Carolina the law is somewhat drastic, as it should be, in granting an absolute divorce. N. C. Code, supra, Sec. 1659, is as follows: "Marriage may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases: 1. If the husband or wife commit adultary," etc.

Section 1659(a), is as follows: "Marriages may be dis- [fol. 74] solved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the state for a period of one year. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce." There are other provisions not necessary to set forth.

Section 1661, provides that the affidavit filed with the complaint must state: "That the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for di-

vorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for one year next preceding the filing of the complaint," etc.

If these allegations above are not shown, the Court has no jurisdiction. In Holloman v. Holloman, 127 N. C., 15 (16), it is said: "That requirement is for the good of the public at large, and not for the convenience or benefit of the parties to the action. The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application and, if it is wanting, there is no jurisdiction in the Court." Woodruff v. Woodruff, 215 N. C., 685 (689).

In this State a jury must pass on the facts. N. C. Code, supra, Sec. 1662, is as follows: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove [fol. 75] the adultery of the other, nor shall the admissions of either party be received as evidence to proce such facts."

In 27 Corpus Juris Secundum, p. 1295, the following is stated: "Where plaintiff only is domiciled in the state of the forum, and has obtained a decree of divorce for a cause recognized as valid in such state, after constructive service of process on defendant, according to the course and practice of the court, a court of another state will recognize the decree when required to do so by a statute of that state; but it is not obliged to do so by the full faith and credit clause of the federal constitution except where, as shown infra this section, the matrimonial domicile is in the state where the decree is rendered. Even though a court of another state is not required by constitution or statute to recognize and give effect to the decree, it may do so as a matter of comity and in some states will do so unless there is some good and valid reason to the contrary; but in a few states the courts require the presence of certain conditions

before they will extend recognition; and in other states recognition is refused," citing many authorities. Pridgen v. Pridgen, 203 N. C., 533.

In 27 C. J. S., sec. 333, at pp. 1296-7, we find: "Where, however, the state of plaintiff's domicile is not also the matrimonial domicile, a decree of divorce based on substituted service and without personal service on, or appearance by, defendant, although enforceable in the jurisdiction where rendered, is not entitled to obligatory recognition or enforcement in other states or in the District of Columbia in virtue of the full faith and credit clause of the federal constitution, although the courts of other states or of the District of Columbia are not prevented from recognizing such decrees on principles of comity if they see fit, and will do so, as a rule, unless contrary to public policy or to good morals, but they are not bound to do so, and the courts of some states do not."

The sole question arising under Article IV, Section 1, of the Federal Constitution in this case is whether a divorce granted in the State where the plaintiff alone is domiciled [fol. 76] is entitled to full faith and credit when the defendant is only served with process constructively and makes no appearance in the action. This question is answered in the negative by the celebrated case of Haddock v. Haddock, 201 U. S., 562, 26 Sup. Ct. 525, 50 L. Ed., 867, justly recognized as a landmark in the law of foreign divorces.

The divorces obtained by the defendants in actions in Nevada against North Carolina citizens, with service by publication in one case and personal service outside the state in the other, clearly come within the scope of the decision in Haddock v. Haddock, supra, and recognition is not required by the Federal Constitution.

The carefully prepared brief of defendants cites cases in other jurisdictions that differ from the well-settled law in this State. The most recent of our cases is Tyson v. Tyson, 219 N. C., 617 (618-19), which says: "It is fundamental that a State 'has no power to enact laws to operate upon things or persons not within her territory.' Irby v. Wilson, supra (21 N. C., 568). Notice and hearing are essential to due process of law under the Fourteenth Amendment of the Constitution of the United States, McGehee, Due Process of Law, 76; Honnold, Supreme Court Law, 847; Scott v. McNeal, 154 U. S., 34 (36), 38 L. Ed., 896 (901); and there is neither notice nor hearing under such fictional

service. Pennoyer v. Neff, supra (95 U. S., 714, 24 L. Ed., 565). Whatever the effectiveness of such a proceeding where both parties are within the jurisdiction of the forum, it has no extraterritorial effect upon a resident of another State or the matrimonial status there existing, unless the laws of the State of such residence recognize the proceeding as valid. Here they do not. It has been the law of this State since early times that a divorce decree obtained in a foreign State against a resident of this State, where there has been no personal service within the jurisdiction of the forum, and no answer or appearance or other participation in the proceeding which might be considered its equivalent, is void here. Irby v. Wilson, supra (21 N. C., 568); Arrington v. Arrington, 102 N. C., 491 (512), 9 S. E. 200; Harris [fol. 77] v. Harris, 115 N. C., 587; 20 S. E., 187; S. v. Herron, 175 N. C., 754, 94 S. E., 698; Pridgen v. Pridgen, supra (203 N. C., 533, 539)."

The defendants excepted and assigned error to the following portion of the charge of the Court—a contention, but correct in principle: "The State contends that these defendants each had a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second marriage or purported marriage contract. That the feme defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina, that is, Mrs. O. B. Williams and Mr. Hendrix. That neither of these persons, to-wit, Mrs. Williams and Mr. Hendrix, personally or by attorney, made any appearance in the courts of Nevada and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada not to establish a bona fide residence, but solely for the purpose of taking advantage of the laws of that State and obtain a divorce through fraud upon that court."

The Court charged the law fully, as laid down in Pridgen v. Pridgen, supra, 203 N. C., 533 (539), also State v. Herron, supra, 175 N. C., 754. In these cases many authorities are cited to sustain the charge in the Court below.

In regard to the postal card, the Court charged as follows (which we think correct): "The defendants offered a card in evidence, and with respect to that card the Court charges you, gentlemen of the jury, that the card indicated or agreed

to do certain things, but the card within itself, in law, does not constitute a personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the papers were sent to him, that would have constituted a personal appearance, but by promising to make a personal appearance by attorney does not constitute one. It takes more than that. * * * It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of [fol. 78] that promise." After reciting the facts: "Whereupon, the Court charges you as a matter of law that the purported or attempted service of the Sheriff of Caldwell County upon the defendant's wife, Mrs. Williams, of the pleadings and papers to this State from the State of Nevada had no effect in law, because the Sheriff has no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the Court so instructs you."

This Court has held that a bona fide belief in the invalidity of a first marriage is not a defense to a prosecution for bigamy when in fact the marriage was valid and subsisting. State v. Robbins, 28 N. C., 23, supra. There seems to be no reason why a defendant's belief that a former marriage has been dissolved when in fact it has not been under the laws of this State should be any more efficacious as a defense. It is submitted, therefore, that the rule established in Irby v. Wilson, 21 N. C., 568, that foreign *ex parte* divorces will not be recognized in this State applies in criminal cases to the same extent that it applies in civil cases.

We think the charge correct from the facts appearing of record. Most of the exceptions and assignments of error are to the charge of the Court below, none of them can be sustained from the view of the well-settled law we take in this case. None constitute prejudicial or reversible error.

The record discloses that defendant O. B. Williams left his wife, with whom he had been married and lived as husband and wife for some twenty-three years and had reared a family of four children, in Caldwell County, N. C., on May 7, 1940. On June 26, 1940, a little over a month later, a summons and complaint were filed, signed by him, in the Eighth Judicial Court of Clark County, Nevada (Otis Baxter Williams vs. Carrie Ora Williams) alleging that he was

a resident for more than six weeks immediately preceding the commencement of the action of said County and State. The complaint alleged as a cause for divorce against the [fol. 79] defendant "extreme cruelty", etc. This complaint was filed by I. S. Thompson, attorney for O. B. Williams, plaintiff. Thompson was also Notary Public and it was subscribed and sworn to before him. Affidavit of publication was subscribed and sworn to before I. S. Thompson who was Attorney and Notary Public. No personal service on defendant, Carrie Ora Williams, or appearance by her was made. The Sheriff of Caldwell County, N. C., delivered a summons and complaint on July 18, 1940. Decree of Divorce signed by Roger Foley, District Judge, signed Aug. 26, 1940, finds certain facts and grants the divorce without a jury finding the facts. On October 4, 1940, O. B. Williams married Lille Esther Hendrix in Clark County, Nevada. They returned almost immediately after the marriage and lived together as husband and wife in Avery County, North Carolina, near Lenoir, North Carolina.

The record discloses that defendant Lille Shaver Hendrix was married to Thomas George Hendrix about twenty years and they lived together as husband and wife until May, 1940. On June 26, 1940, a little more than a month after leaving her husband, she had a summons issued and filed a complaint against him in the Eighth Judicial Court of Clark County, Nevada, entitled Lillie Esther Hendrix vs. Thomas George Hendrix, alleging that she was a resident for more than six weeks immediately preceding the commencement of the action and was a resident of said County and State; alleging cause for divorce that her said husband had "wilfully neglected to provide for her", etc., and "extreme mental cruelty". This complaint was filed by I. S. Thompson, her attorney. Thompson was also a Notary Public and it was subscribed and sworn to before him as Notary Public. Affidavit of Publication was subscribed and sworn to before her attorney, and as Notary Public. No personal service on defendant, George Thomas Hendrix, or appearance by him. The postal card introduced in evidence was no acceptance of service or appearance. The summons was published in a local paper once a week for four weeks. Decree of divorce signed by Roger Foley, Dist. Judge, October 4, 1940, finds certain facts and grants the divorce without a jury finding the facts. On

[fol. 80] the same day, October 4, 1940, she married O. B. Williams in Clark County, Nevada. They came almost immediately after the marriage to North Carolina, and lived together as husband and wife in Avery County, near Lenoir, North Carolina. They employed the same Attorney, filed summons and complaint on the same day, and immediately married on the day the decree of divorce was granted Lillie Shaver Hendrix. O. B. Williams had obtained a decree of divorce a short time before, he was represented by the same Attorney and the decrees of divorce were granted by the same Court. The actions were numbered 10650 and 10651. The record discloses not only no personal service, as required by the decisions of this Court, but all the evidence indicates collusion between the defendants, and bad faith in attempting to secure decrees of divorce, contrary to the laws of this State.

For the reasons given, we see no prejudicial or reversible error in the trial in the Court below.

No Error.

Barnhill, J., concurring

Stacy, C.J., & Winborne, J., join in concurring opinion.

[fol. 81] In Supreme Court of North Carolina

No. 289

State

vs.

O. B. Williams and Lillie Shaver Hendrix

Concurring Opinion—Filed December 10, 1941

Barnhill, J., concurring:

When the State offered evidence tending to show the first marriage of each of the defendants; that the wife of the defendant Williams and the husband of the defendant Hendricks are each still living; the second contracts of marriage and subsequent cohabitation of the defendants within this State it made out a prima facie case which, nothing else appearing, would require a verdict of guilty. That each of the defendants had been divorced was a fact to be

proven in defense. S. v. Norman, 13 N. C., 222; S. v. Melton, 120 N. C., 591; S. v. Herron, 175 N. C., 754, 94 S. E., 698; Thompson v. S., 20 Ala., 12; Com v. Bolich, 18 Pa. Co. Ct., 401. Hence the question here presented is this: Have the defendants presented evidence of a valid defense?

The decrees of divorce relied upon by defendants were obtained in the State of Nevada on constructive service. The court rendering the judgments had no jurisdiction of the person of the respective defendants therein. Arrington v. Arrington, 102 N. C., 491 and 127 N. C., 190; Harris v. Harris, 115 N. C., 587; Pridgen v. Pridgen, 203 N. C., 533, 166 S. E., 591; Tyson v. Tyson, 219 N. C., 617; Thompson v. State, supra; Bell v. Bell, 181 U. S., 175, 45 L. Ed., 804.

Marriage is regarded as creating a status within the protection and control of the laws of the matrimonial domicile which, from considerations of public policy, will not be deemed to be destroyed unless the resident party has been brought within the jurisdiction of the foreign state by more than constructive service. Tyson v. Tyson, supra.

Judgments of divorce rendered by the foreign state are not protected by the full faith and credit clause (Art. IV, sec. 1) of the Federal Constitution. The mere domicile within the State of one party to the marriage does not give the courts of the State jurisdiction to render a decree of divorce enforceable in all the other States by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. Haddock v. Haddock, 201 U. S., 562, 50 L. Ed., 867; S. v. Herron, supra; Thompson v. S., supra. They are subject to attack for want of jurisdiction of the rendering [fol. 82] court over the person of the defendant named therein. Thompson v. Whitman, 85 U. S., 897; Haddock v. Haddock, supra; S. v. Herron, supra.

That the marriage of the defendants was consummated in another State is immaterial. "If any person, being married, shall contract a marriage with any other person, outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of biganiy". C. S. 4342; State v. Moon, 178 N. C., 715, 100 S. E., 614; S. v. Herron, supra.

It follows that under our law the defendants failed to establish a divorce or second marriage effective as a valid defense to the prosecution. The divorce decrees, being rendered upon constructive service, were without force or effect within this State. Their subsequent marriage, had it been contracted in this State, was bigamous. Cohabitation thereunder within this State constituted a bigamous cohabitation.

For the reasons stated I agree that the judgment below should be affirmed.

Stacy, C. J., and Winborne, J., join in this opinion.

[fol. 83] In Supreme Court of North Carolina

[Title omitted]

Clerk's Certificate and Docket Entries

Appeal docketed 7 June, 1941.
Case argued 7 October, 1941.
Opinion filed 10 December, 1941.
Final Judgment entered 10 December, 1941.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petition to rehear in criminal actions.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 21 January, 1942.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Seal.)

[fol. 84] Supreme Court of the United States

Order Allowing Certiorari—Filed March 30, 1942

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U.S.
FILED
FEB 26 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~979~~ 29

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
HARRY F. GILLIS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 979

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Summary.

Your petitioners, O. B. Williams and Lillie Shaver Hendrix, (the names under which your petitioners were indicted) petition this Honorable Court for a writ of certiorari to issue to the Supreme Court of North Carolina, and would respectfully show:

That your petitioners were indicted in the Superior Court of Caldwell County, North Carolina, under a bill of indictment as appears in the record (R. 1), charging the crime of bigamous cohabitation; that your petitioners were citizens and residents of the State of Nevada and had been so adjudged by a decree of a court of competent jurisdiction

in said State of Nevada (R. 17, 34); that upon an adjudication that the *bona fide* residence of your petitioners was in the State of Nevada your petitioners procured a judgment of absolute divorce from their respective spouses (R. 16, 34) in a court of competent jurisdiction in the State of Nevada, your petitioner, O. B. Williams procuring service under and by virtue of a statute in the State of Nevada providing for service of process in a foreign State in actions, *in rem* or *quasi in rem* by the sheriff of the County and State of the residence of the defendant; the former spouse of Lillie Shaver Hendrix having signed a card (R. 9) agreeing to accept service of the process when the same was forwarded to him and having fled to the State of Ohio, actual service was had upon him by publication. Upon the rendition of a decree of absolute divorce, which decree restored the petitioners to the status of single persons in the State of Nevada, your petitioners intermarried with each other in the State of Nevada and in accordance with the laws of the State of Nevada and subsequently thereto came to the State of North Carolina where they were indicted for bigamous cohabitation. Your petitioners relied upon Article 4, Section I of the Constitution of the United States requiring that such full faith and credit be given in the State of North Carolina to the decrees of the courts of the State of Nevada as are given to those decrees in the State of Nevada;

Your petitioners relied upon Article 4, Section II of the Constitution of the United States which requires that they be accorded the same privileges and immunities in every State of the Union as they were accorded in the State of Nevada which provision is as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Your petitioners also relied upon the proposition that it was and is an unconstitutional extension of legislative power to extend to the State of Nevada the marriage and divorce laws of the State of North Carolina and by judicial interpretation of the North Carolina legislative enactments dictate what should be valid and invalid in the State of Nevada.

Amendment 14 of the Constitution of the United States provides among other things as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Your petitioners further relied upon the proposition that a divorce action is one *in rem* or *quasi in rem* affecting only the status of the parties involved and they, therefore, contend that substituted service is not only authorized by the laws of the State of Nevada but is also authorized by the laws of the State of North Carolina, Section 491 of the North Carolina Code being as follows:

> "When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:"

The trial judge charged the jury as a matter of law that the Nevada divorce decrees and the marriage of your petitioners all consummated in the State of Nevada were void as a matter of law under the laws of the State of North Carolina irrespective of the provisions of the Constitution of the United States (R. 42, 43);

The Supreme Court of North Carolina held that the Courts of North Carolina are under no obligation by virtue of Article 4, Section I of the Constitution of the United States to give full faith and credit to the decrees of sister States (R. 70).

Jurisdiction.

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves three distinct federal questions, as follows:

1.

The Supreme Court of North Carolina is obliged to give full faith and credit to the decrees of a sister State when those decrees have been entered into pursuant to and in accordance with the laws of such sister States;

2.

The petitioners having been adjudged *bona fide* citizens and residents of the State of Nevada and having married in said State pursuant to its laws they were entitled to the benefits conferred by Article 4, Section II of the Constitution of the United States;

3.

The petitioners having been legally divorced pursuant to the laws of the State of their domicile and having intermarried with each other pursuant to the laws of the State of their domicile could not by virtue of the provisions of Amendment 14 of the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving into some other State.

The foregoing propositions were presented to the Supreme Court of North Carolina by your petitioners' briefs but the Supreme Court of North Carolina held that it was

not bound by the full faith and credit clause of the Constitution of the United States and failed to pass upon the other constitutional questions. It is not open to your petitioners to file a petition to rehear in that court (see clerk's certificate, R. 76).

Insofar as your petitioners have been able to ascertain the Supreme Court of the United States has never passed upon the constitutional questions involved in this matter where parties were prosecuted for bigamy or bigamous cohabitation.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment and opinion of the Supreme Court of North Carolina; and your petitioners will ever pray.

W. H. STRICKLAND,
Lenoir, North Carolina,
HARRY F. GILLIS,
Washington, D. C.,
Attorneys for Petitioners, O. B. Williams and Lillie Shaver Hendrix.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of North Carolina sought to be reviewed is reported 220 North Carolina, page 445, and appears in the record filed herein beginning on page 55 and continuing through page 76 inclusive.

Jurisdiction.

The petitioners contend first that under the full faith and credit clause, Article 4, Section I of the Constitution of the United States, that they are entitled to have the opinion of the Supreme Court of North Carolina reviewed, said opinion declaring that it is not bound by the properly exemplified judicial decrees of a sister State.

In *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26, a recent case, the Supreme Court of the United States held:

> "28 U. S. C. A., Sec. 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. Thus Congress rightly interpreted the clause to mean not some but full credit—the act extended the rule of the Constitution of all courts, Federal as well as State."

Likewise in *Loughran* v. *Loughran*, 292 U. S. 216, 78 L. Ed. 1219, it is held:

> "Marriages not polygamous or incestuous or otherwise declared void by statute will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."

> "Courts of the District of Columbia are bound, equally with the courts of the states, to observe the command of the full faith and credit clause."

"If a marriage is valid in the state in which it is contracted its validity will be recognized in another state so as to entitle the woman to dower in the lands in the latter state although the marriage would not have been valid as contracted in such state."

In *Atherton* v. *Atherton*, 181 U. S. 155, this Court held:

"A decree of divorce based upon notice pursuant to state laws is entitled to faith and credit in the courts of another State."

In *Janssen* v. *Janssen*, 269 Ill. App. 233, it was held where a party to divorce proceedings in a sister State has brought suit upon constructive service and established a *bona fide* residence in such State and the suit is free from any fraud, the courts of Illinois will give full faith and credit to the decree of such other State.

In *Miller* v. *Miller*, 200 Iowa 1193, foreign divorce decrees are held to be entitled to full faith and credit.

In *McKisson* v. *McKisson*, 154 Sou. 618, the Louisiana courts held that the courts of one State cannot ignore divorce decrees rendered in another State.

In *Palmer* v. *Palmer*, 265 Mass. 242, it was held that non residents of the State who married outside of the State though violative of the restrictions of the State of the forum were entitled to have such marriages recognized in the State of the forum.

In *Hanna* v. *Hanna*, 224 Mo. App. 1142 (32 S. W. 2d. 125) it was held that a divorce decree rendered in another State and not proven to have been obtained by fraud or collusion is entitled to recognition.

Pahy v. *Pahy*, 107 N. J. Eq. 538 (153 Atlantic 519) it was held that where the court rendered the decree of divorce if it had jurisdiction of the subject matter its adjudication that the complainant or plaintiff in the divorce action was

a *bona fide* resident was conclusive and final and binding upon all the courts.

The case of *Haddock* v. *Haddock*, 201 U. S. 562, 50 L. Ed. 867, is distinguishable from the case at bar for the reason that the matter there involved was a right *in personam* which the foreign court had attempted to adjudicate under constructive service. The petitioners in the instant case were adjudged by the courts of Nevada to be *bona fide* residents of that State. There is absolutely no evidence in the record or offered by the State to show fraud upon the court of Nevada in the procurement of such a judgment. In consequence of that judgment and while citizens and residents of Nevada, your petitioners procured decrees of absolute divorce in full compliance with the laws of Nevada. Subsequent to said decrees and while your petitioners were still *bona fide* residents of the State of Nevada, your petitioners were intermarried with each other. Some time later they came to the State of North Carolina, and the record is devoid of any evidence that they intended to change their legal domicile from the State of Nevada to North Carolina.

Therefore, the petitioners contend that under Article 4, Section II of the Constitution of the United States that they were entitled to the privileges and immunities therein guaranteed to them.

In *Conner* v. *Elliott*, 18 How. 591, 15 L. Ed. 497, the court held the privileges secured by this clause are those which belong to citizenship.

In this case it is to be observed that there is no statute prohibiting the establishment of residence in Nevada and the procurement of divorce in Nevada and marriage in Nevada. These acts were perfectly legal in the State of Nevada and not prohibited by any North Carolina statute.

In *Cole* v. *Cunningham*, 33 Fed. 538, it was held:

> "The intention of this clause was to confer on the citizens of the service of a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

Amendment 14 of the Constitution of the United States provides among other things, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The fact that the petitioners were citizens of the United States cannot be successfully disputed. Being citizens of the United States they had the right to migrate from one State to another. There is no Federal statute prohibiting the migration of people from North Carolina to Nevada or any other State. There is no Federal statute prohibiting people who have met the residence requirements of the State of Nevada from instituting divorce actions in said State.

There being no prohibition against such acts they, therefore, constitute privileges to all of the citizens of all of the States and when the Supreme Court of North Carolina in its opinion stated that the Nevada decrees in this instance were null and void for lack of a compliance with the North Carolina Statutes in obtaining a divorce, they by that opinion enforced a law applicable only to the State of North Carolina, in the State of Nevada and that said opinion is in violation of the fourteenth Amendment of the Constitution of the United States.

Butchers Benev. Ass'n. v. *Crescent City, L. S. L. and S. H. Co.*, 16 Wall. 36, 21 L. Ed. 394, it is held that privileges and immunities of the citizens of the United States are those which are placed by the above clause under the pro-

tection of the Federal Constitution. In *Virginia* v. *Rives*, 24 L. Ed. 667, it is held that the section applies to State action exclusively.

Divorce Action is an Action In Rem.

It is the contention of the petitioners that an action for divorce is one *in rem* or at least *quasi in rem* affecting only the status of the parties and does not operate in any sense as an action *in personam*, and that, therefore, substituted service is a recognized mode of service in all of the States of the Union which grant divorces, North Carolina included.

Cases which hold that a divorce action is one *in rem* are as follows:

Ditson v. *Ditson*, 4 R. I. 87, *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689, *Miller* v. *Miller*, 200 Iowa, 1193, *Freet* v. *Holdorf*, 205 Iowa, 1081, *Hood* v. *Hood*, 93 Mass. 196, *Kendrick* v. *Kendrick*, 188 Mass. 550, *Coffey* v. *Coffey*, 71 S. W. (2d) 141, *Keenan* v. *Keenan*, 40 Nev. 351.

If a Divorce Action is One In Rem Service by Publication is Valid.

As affecting the marital status of persons divorced upon substituted service, it appears that the courts practically unanimously hold that a divorce action is one *in rem* or *quasi in rem*. If it be either *in rem* or *quasi in rem*, then under the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, substituted service is valid and the Supreme Court of North Carolina was obliged under the full faith and credit clause and the privileges and immunities clause and the Fourteenth Amendment of the Constitution of the United States to recognize the validity of the Nevada decrees granted your petitioners and to recognize the Nevada marriage entered into between your petitioners while they were *bona fide* citizens and residents of that State.

Conclusion.

Symmetrically and logically stated the proposition is this:

The petitioners in good faith established their residence in Nevada in accordance with the laws of Nevada and, in good faith and notice to their former spouses, obtained decrees of divorce. They, in good faith, intermarried in the State of Nevada believing at all times that they had met the requirements of the law.

Can the State of North Carolina successfully prosecute the petitioners who have legally divorced and legally married in a sister State in spite of the safeguards guaranteed citizens of the United States by the Constitution of the United States?

Respectfully submitted,

W. H. Strickland,
Lenoir, North Carolina.
Harry F. Gilkis,
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 29

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

BRIEF FOR PETITIONERS.

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THE STATE OF NORTH CAROLINA.

BRIEF FOR PETITIONERS.

Syllabus of Brief.

A divorce action is one *in rem*. *Garner* v. *Garner*, 56 Md. 127; *Hood* v. *Hood*, 110 Mass., 463; *Ferrell* v. *St. Paul*, 64 N. W., 809; (Minn.); *Gould* v. *Crow*, 57 Mo., 200; *Page* v. *Baker*, 75 N. Y. 78; *Ditson* v. *Ditson*, 4 R. I., 87; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Miller* v. *Miller*, 200 Io., 1193; *Freet* v. *Holdorf*, 205 Io., 1081; *Kendrick* v. *Kendrick*, 188 Mass., 550; *Keenan* v. *Keenan*, 40 Nev. 35; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix II), in that said State of North Carolina authorizes by the statute set forth as Appendix II the granting of divorce upon service by publication.

An action for divorce being one *in rem* service by publication is valid. *Pennoyer* v. *Neff*, 95 U. S., 714; *Gassert* v. *Strong*, 38 Mont. 18; *White* v. *Glover*, 116 N. Y. S., 1059.

North Carolina under Article IV, section I of the Constitution of the United States is obliged to give full faith and credit to a foreign divorce decree in the absence of fraud. *Faris* v. *Hope*, 298 F. 727; *Frey* v. *Frey*, 58 F. 2d 1046; *Davis* v. *Davis*, 83 Lawyers Edition, 26; *Loughran* v. *Loughran*, 292 U. S., 216; *Atherton* v. *Atherton*, 181 U. S. 155; *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422; *Cardinale* v. *Cardinale*, 68 P. 2d 351; *Miller* v. *Miller*, 200 Iowa; 1193; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 193 A. 484; *Renner* v. *Renner*, 181 A. 191; 19 Corpus Juris, section 836, page 370.

Plaintiffs in error having been adjudged bona fide citizens of Nevada are entitled, under Article IV, Section II of the Constitution of the United States, to the privileges and immunities therein guaranteed. *Conner* v. *Elliott*, 15 Lawyers Edition, page 497; *Cole* v. *Cunningham*, 33 Federal 538.

The North Carolina Statute involved in this action, as set out in Appendix I, is unconstitutional for the reason that it is an unlawful extension of legislative power to a foreign state legislating what shall be lawful and unlawful in such foreign state. *Connolly* v. *Union Sewer Pipe Company*, 46 Lawyers Edition, 679; *Ratcliff* v. *The State of Texas*, 289 S. W. 1072.

It is the social duty as well as the legal duty of the Court to reverse the North Carolina Supreme Court because to uphold the decision of said State's Supreme Court will have far reaching social aspects in that it would disrupt many homes, bastardize many children and abrogate vested property rights based upon such marital relationships.

Statement of Jurisdiction.

This court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves three distinct Federal questions as follows:

1. Article IV, Clause I of the Constitution of the United States is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Supreme Court of North Carolina is obliged to give full faith and credit to the judicial decrees of a sister state when those judicial decrees have been entered pursuant to and in accordance with the laws of such sister state.

2. The plaintiffs in error having been adjudged bona fide citizens of the State of Nevada, and that adjudication not having been impeached for fraud, the plaintiffs in error under and by virtue of Article IV, Clause II of the Constitution of the United States were and are entitled to the same privileges and immunities in the State of North Carolina as were accorded to them in the State of Nevada under and by virtue of the decrees of divorce there rendered and the subsequent marriage entered into.

3. That under the Fourteenth Amendment to the Constitution of the United States, the plaintiffs in error having been adjudged bona fide citizens of the State of Nevada and having intermarried with each other pursuant to the laws of that State cannot be successfully prosecuted under laws of the State of North Carolina when the effect of such laws are to reach beyond the borders of the State of North Carolina and declare what is valid or invalid in sister states.

Such extension is an unconstitutional extension of legislative power which is condemned by Amendment XIV, Clause I of the Constitution of the United States.

Statement of Case.

The plaintiffs in error, O. B. Williams and Lillie Shaver Hendrix, established a bona fide residence in the State of Nevada and such residence was adjudged to be bona fide (see decree R. 17) (See decree R. 34), and upon such adjudication were duly awarded a decree of divorce from their respective spouses by a court of competent jurisdiction in the State of Nevada. Subsequent to the rendition of the decrees of divorce, the plaintiffs in error intermarried with each other in the State of Nevada and in accordance with the laws of that State. Subsequent to their intermarriage with each other the plaintiffs in error removed to the State of North Carolina and the State of North Carolina indicted the plaintiffs in error under Section 4342 of the North Carolina Code defining the crime of bigamous cohabitation (See appendix I).

Upon a verdict of guilty his Honor H. Hoyle Sink imposed sentence upon the male defendant of not less than three nor more than ten years in the State's Prison at Raleigh, North Carolina, and imposed upon the female defendant a prison sentence of not less than three nor more than five years in the State's Prison at Raleigh, North Carolina (R. 48).

Upon appeal to the Supreme Court of North Carolina the judgment of the lower court was affirmed (see opinion R. 55).

The plaintiffs in error filed a petition for writ of certiorari in this Honorable Court on February 26, 1942, which petition was granted on March 30, 1942 (R. 76).

Assignment of Errors.

The plaintiffs in error made the following assignments of error in the Superior Court of Caldwell County and in the Supreme Court of North Carolina:

Error No. 1 (R. 49)—The defendants and each of them assign as error the Court's failure to allow the defendants' motions for judgment of nonsuit at the close of the State's evidence, as follows:

At the close of the State's evidence the defendants and each of them move for judgment of nonsuit. Motion denied as to each defendant and the defendants and each of them except.

Error No. 2 (R. 50)—The defendants and each of them assign as error the refusal of the Court to allow their motions for judgment as of nonsuit at the close of all the evidence as follows:

At the close of all the evidence the defendants and each of them renewed the motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them except.

Error No. 3 (R. 50)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (A) to (B), which is as follows:

(A) The State contends that these defendants each has a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second marriage or purported marriage contract. That the feme defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina; that is, Mrs. O. B. Williams, and Mr. Hendrix. That neither of these persons, to-wit, Mrs. Williams and

Mr. Hendrix, personally or by attorney, made any appearance in the courts of Nevada, and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada, not to establish a bona fide residence, but solely for the purpose of taking advantage of the laws of that State and obtain a divorce through fraud upon that court. (B)

Error No. 4 (R. 50)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (C) to (D), which is as follows:

(C) Gentlemen of the jury, the court charges you as a matter of law that service by publication in the State of (fol. 54) Nevada, as indicated by the documentary evidence, does not give to the State of Nevada jurisdiction to grant a divorce to a married person that would authorize and validate a second marriage in the State of North Carolina. (D)

Error No. 5 (R. 51)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (E) to (F), which is as follows:

(E) I read to you the following syllabus from Book 203, North Carolina Reports, reading verbatim from Syllabus 3, page 533: "Divorce of another State based upon service by publication on residents of this State is not valid here." (F)

Error No. 6 (R. 51)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (G) to (H), which is as follows:

(G) Where the husband domiciled in another State obtains a decree of absolute divorce from his wife domiciled in this State in which proceeding the wife is served with summons by publication in accordance with the laws of such other State (that is, by putting in the newspaper notifying the defendant and the public that application is being made for divorce), and in which the wife does not

appear in person or by attorney, the decree of divorce based upon such service is not valid in this State. And in the instant case the State of North Carolina alleges and insists that neither the wife of the male defendant here in North Carolina, nor the husband of the female defendant, made a personal appearance in that court, nor did they, the State insists, make any appearance by attorney or have anyone to represent them, or make any appearance otherwise. (H)

Error No. 7 (R. 51)—The defendants and each of them assign as error that (fol. 55) portion of the court's charge embraced within the letters (I) to (J), which is as follows:

(I) I have read this verbatim, Syllabus 3 from *Pridgen* v. *Pridgen*, in 203 North Carolina Reports, which is directly upon the subject. This case was tried by Judge Barnhill, at present an Associate Justice of the Supreme Court of North Carolina, at that time a Superior Court Judge, and incidentally one of the greatest lawyers that this State has ever produced. The opinion is written by Judge Adams, another great lawyer who has since gone to his reward. (J)

Error No. 8 (R. 52)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (K) to (L), which is as follows:

(K) The defendants offered a card as evidence, and with respect to that card the court charges you, gentlemen of the jury, that the card indicated or agreed to do certain things, but the card itself, in law, does not constitute a personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the papers were sent to him, that would have constituted a personal appearance, but my promising to make a personal appearance by attorney does not constitute one. It takes more than that. Suppose I want to make an appearance in the State of Nevada. I may authorize it in writing or by

attorney—someone get up and appear for me. The State insists that it was not done in this case and the defendants that it was. It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of that promise. (L)

Error No. 9 (R. 52)—The defendants and each of them assign as error that portion of charge embraced within the letters (M) to (N), which is as follows:

(fol. 56) (M) The court says as follows: "The decree of divorce based upon such service is not valid in this State, and an attempted second marriage of the wife will be declared void in an action brought by the husband of the second attempted marriage." (N)

Error No. 10 (R. 52)—The defendants and each of them assign as error that portion of the court's charge embraced within the letters (O) to (P), which is as follows:

(O) The State insists under the facts and the law that they have no such right. "That in truth and in fact they are not legally man and wife, and that they have been conducting themselves and living as such, and asks you so to find beyond a reasonable doubt." (P)

Error No. 11 (R. 53)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (Q) to (R), which is as follows:

(Q) Before I forget it I want to call your attention to the alleged service by the Sheriff of Caldwell County upon Mrs. Williams. The defendants insist that she was served with process. To make you a party defendant to a lawsuit started and instituted for a divorce in this Court, the Superior Court of Caldwell County, a complaint is filed in the office of the Clerk of the Superior Court, a summons, a document in writing indicating upon its face what it is, is attached thereto, signed by the Clerk of the Superior Court, given to the Sheriff or his deputy or constable, an

officer clothed with the power of serving process. This is taken and served upon the defendant, and until that is done, or the defendant voluntarily comes into court in person or by attorney, the court has no jurisdiction of that defendant, that is here in North Carolina. No man can come into this Court and prepare a complaint and proceed to obtain a (fol. 57) judgment of the court upon it without serving such process upon the defendant, and it properly served as the law provides, because it involves the rights, liberties and privileges of the State citizenship. (R)

Error No. 12 (see R. 53)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (S) to (T), which is as follows:

(S) Whereupon the Court charges you as a matter of law that the purported or attempted service of the Sheriff of Caldwell County upon the defendant's wife, Mrs. Williams, of the pleading and papers to this State from the State of Nevada had no effect in law, because the Sheriff had no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the Court so instructs you. (T)

Error No. 13 (see R. 54)—The defendants and each of them assign as error that portion of the Court's charge embraced within the letters (U) to (V), which is as follows:

(U) Our Supreme Court says, in *State* v. *Herron*, 175 North Carolina, page 754, Syllabus 3: Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide

of his residence for the required time, but not beyond a reasonable doubt, and the same would apply as to bigamous cohabitation and assumption of the marital relation between a man and a woman who are themselves married at the time, and if they so associate themselves together under a contract alleged to be a marital contract in some foreign state being relied upon for a divorce, that Court must have had the (fol. 58) requisite jurisdiction to grant the divorce or divorces in question (V).

Error No. 14 (see R. 54)—The defendants and each of them except and assign as error the charge of the Court as whole, for the reason that the charge states the law incorrectly, and for further reason that the Court charged the jury upon matters of law concerning which there was no evidence with respect thereto.

Argument.

It is to be observed that the plaintiffs in error were adjudged to be bona fide citizens of the State of Nevada (see R. 17 and 34). This finding of fact by the Nevada Court of competent jurisdiction was not attempted to be impeached in the trial of this cause. Such finding of fact is conclusive and binding upon the courts of the State of North Carolina and cannot be collaterally attacked. In *Harding* v. *Harding*, 49 L. Ed. 1066, this Court held that a final decree in chancery is as conclusive as a judgment at law and that the courts of one State must allow to a judgment of a sister State the same effect that it has in the State where rendered.

In 34 Corpus Juris, page 1127, Section 1603, the following is stated to be the law:

The judgment of a court of one State, when sued on, pleaded or introduced in evidence in another State, is entitled to receive the same faith, credit, and respect that

is accorded to it in the State where rendered, so that if valid and conclusive there, it is so in all other States. But a judgment from another State is entitled to no greater effect or finality than would be accorded to it in the State where rendered; and hence if it would there be inconclusive, impeachable, or re-examinable, it will receive no greater consideration or measure of finality in other States. The validity and effect of a judgment must therefore be determined by reference to the laws of the State where it was rendered. If a judgment is valid in the State where it is rendered, it will be given full faith and credit in another State, without inquiring whether the domestic courts would or could have rendered such a judgment, whether such a judgment would have been valid under the local laws, or whether the court rendering the judgment was right or wrong in the interpretation and application of the laws of its own State, or even in its reading and application of the laws of the State where the judgment is brought in question. The rule has been held to apply, although the cause of action or statute upon which the judgment is based is against the law and public policy of the State or territory in which enforcement is sought. Also the judgment will be accorded the effect given it in the State of its rendition, although a similar judgment of a home tribunal would not have the same effect. On the other hand, it has been held that a judgment of a sister State will be disregarded if to enforce and recognize such judgment would in effect nullify the obligations imposed by law in the State of the forum between citizens thereof. For the purpose of determining the laws of the State where the judgment was rendered it is held in some of the States that the courts of one State may take judicial notice of the laws of another State; but this doctrine is not generally accepted. On the contrary, it is held that laws of a foreign State must be proved as facts, and if there is no evidence in regard to the laws of

the State where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own State, and will give effect to the judgment accordingly.

In 19 Corpus Juris, page 179, Section 445, where the law deals particularly with the status of persons, it is held:

Except as to the subsequent status of the parties, that is, that they are no longer husband and wife, a decree is conclusive of the matters determined only when it is set up against a party to the divorce suit; but it does not settle the status of their prior relations so as to render them valid as to the whole world regardless of whether or not they were so in fact. In New York a decree of divorce is binding on a corespondent who appears and contests the allegations of adultery, notwithstanding he is afterward placed in default, but otherwise if he has not appeared.

In 34 Corpus Juris, page 1135, Section 1611, it is held:

A judgment rendered in another State by a court having jurisdiction is conclusive not only as to all matters which were actually in issue and decided in that suit, or which were necessarily implied in, or to be inferred from, the judgment, in the sense that the judgment could not have been rendered without the finding or determination of such matters, but also as to other matters which the parties might have litigated and which might have been decided as incident to, or essentially connected with, the subject matter of the litigation within the purview of the original action, either as a matter of claim or of defense. Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. But a judgment is not conclusive as to any matters which might have been brought into the litigation, or causes of action which plaintiff might have joined, but

which in fact were neither joined nor embraced by the pleadings.

Thus it will be seen that the trial judge was in error in Assignments of Error 3, 4 and 6 when he charged the jury as a matter of law that the Nevada divorce decrees were null and void and of no effect.

Divorce Action Is An Action In Rem.

The plaintiffs in error contend that it is universal law that an action for divorce is one *in rem* affecting the marital status only and that such action being an action *in rem* substituted service is universally recognized as a legal and proper way to confer jurisdiction of the status upon the court rendering the decree when one of the parties is a bona fide citizen and within the jurisdiction of such court. Divorce actions have been held to be actions *in rem* in the following cases:

Garner vs. *Garner*, 56 Md. 127; *Hood* vs. *Hood*, 110 Mass., 463; *Ferrell* vs. *St. Paul*, 64 N. W., 809 (Minn.); *Gould* vs. *Crow*, 57 Mo. 200; *Page* vs. *Baker*, 76 N. Y., 78; *Ditson* vs. *Ditson*, 4 R. I., 87; *Gildersleeve* vs. *Gildersleeve*, 88 Conn. 689; *Miller* vs. *Miller*, 200 Io. 1193; *Freet* vs. *Holdorf*, 205 Io. 1081; *Kendrick* vs. *Kendrick*, 188 Mass. 550; *Keenan* vs. *Keenan*, 40 Nev. 351; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix 2), in that said State of North Carolina authorizes by the statute set forth as Appendix 2 the granting of a divorce upon service by publication.

Action for Divorce Being One in Rem Service by Publication Is Valid.

The distinction between an action *in personam* and an action *in rem* is that in the first instance a judgment

rendered operates so as to require the party against whom same is rendered to do some personal act. Obviously in such a case actual and personal service must be had. But in the latter case, that is an action *in rem*, the judgment does not operate against the person of the defendant but serves only to affect the "thing" in litigation. In a divorce action the decree entered affects only the marital status and does not operate as a judgment *in personam*.

In *Pennoyer* v. *Neff*, 95 U. S. 714, it is held that substituted service in an action *in rem* or *quasi in rem* is a valid service if authorized by the laws of the forum. To the same effect is *Gassert* v. *Strong*, 38 Mont. 18, *White* v. *Glover*, 116 N. Y. S. 1059.

Likewise the case of *Millikan* vs. *Meyer*, 85 L. Ed. 278, holds that service by publication in actions *in rem* or quasi *in rem* is valid.

North Carolina Courts Under Article IV, Section I of the Constitution of the United States Are Required to Give Full Faith and Credit to the Nevada Decrees.

Addressing ourselves to Assignments of Error 1, 2, 4 and 6, it is to be observed that under the criminal procedure of North Carolina a motion for judgment as of nonsuit at the close of the state's testimony, which motion is renewed at the close of all of the testimony, raises all the legal questions federal as well as state which may be and were argued upon such motion.

By the overwhelming weight of authorities throughout the United States, it is held that a judgment rendered in one state, pursuant to and in accordance with the laws of that State, shall be recognized and given full faith and credit in every other state in the union when the same has been duly authenticated in accordance with the acts of Congress. In *Faris* v. *Hope*, 298 F. 727, it was held that a

decree of divorce will be given the same effect in any court within the United States as it is given in the jurisdiction where rendered. Then in *Frey* v. *Frey*, 58 F. 2d, 1046, the court held that if a divorce decree was valid in the jurisdiction where the same was rendered then it is valid everywhere. *Davis* v. *Davis*, 83 L. Ed. 26, which is a recent case, held that if the decree of divorce was valid in the jurisdiction rendering it, it must be recognized, upheld and given full force and effect in every other jurisdiction. The decision in *Davis* v. *Davis* affirms the principle laid down in *Loughran* v. *Loughran*, 292 U. S. 216. This principle was first adopted by the United States Supreme Court in the case of *Atherton* v. *Atherton*, 181 U. S. 155. A divorce action being an action affecting only the *res*, that is the marital status, and having been once adjudicated, it becomes *res judicata* and a bar to subsequent suit for the same relief. *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422. The foregoing is generally recognized to be the law regardless of the place of the marriage. *Voorhies* v. *Voorhies*, *supra*.

In *Cardinale* vs. *Cardinale*, 68 P. 2d 351, and *Miller* vs. *Miller*, 200 Iowa 1193; *Commonwealth ex rel. Cronhardt* vs. *Cronhardt*, 193 A. 484, it is held that where a decree of divorce is regular on its face it is presumed to be valid in all respects. Following this presumption it is held in the same case and in *Renner* vs. *Renner*, 181 A. 191, that the burden of proof in the face of a divorce decree regular upon its face rests upon the parties attacking such decree.

It is to be observed that in the case at bar no evidence of any kind was offered by the State of North Carolina attacking the divorce decrees in question for any reason or upon any ground.

Title 28, U. S. C. A. section 687 is the Congressional Enactment providing the manner in which judicial proceedings

of another state may be authenticated. The Legislature of North Carolina has adopted that Congressional Enactment and Appendix III, section 687 of the North Carolina Code is as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is to be observed that there is no law in North Carolina prohibiting citizens in North Carolina from migrating to other states and there establishing bona fide residence and avail themselves of the divorce laws of that State. 19 Corpus Juris, section 836, page 370, we find the following to be stated as a general proposition of law:

> "There is no rule of law, however, which prevents one from changing his domicile in order to facilitate his obtaining a divorce or to secure other advantages he may think that the laws of the new domicile may afford him; he is free to change at his pleasure, providing the change is a bona fide one and a divorce so acquired will be recognized in the State of his former domicile."

There certainly can be no question of fraud in the instant case since one of the parties was served with process by the sheriff of Caldwell County pursuant to a statute duly en-

acted in Nevada providing for such method of service, which statute is set forth as Appendix III.

The Plaintiffs in Error Having Been Adjudged Bona Fide Citizens of the State of Nevada Are Entitled to All Privileges and Immunities Guaranteed by Article IV, Section II of the Constitution of the United States.

The Nevada Court received evidence upon the good faith of the residence of the plaintiffs in error and upon that evidence adjudged that the plaintiffs in error were bona fide residents.

In *Conner* vs. *Elliott*, 15 L. Ed. 497, the court held that the privileges secured by this clause of the Federal Constitution were those privileges belonging to citizenship. It is observed that citizenship in the United States is paramount to citizenship in individual states. Otherwise there could be no solidity of the union. Should it be determined that citizens owe their first allegiance to the various states and a secondary allegiance to the United States then it is conceivable that such an attitude among the people generally would eventually result in a disruption of a union and the establishment of forty-eight or more separate and independent countries, and no question exists which would lead more readily to such a situation than the question of marriage and divorce. It is of the utmost importance that this Court adopt the principle of law that a divorce action is one *in rem*, and that service by publication is valid insofar as it affects the marital relationship of the parties. To like effect is the case of *Cole* vs. *Cunningham*, 33 Fed. 538.

The North Carolina Statute Involved in This Action, To-wit; Appendix I, Herein Is Unconstitutional.

Said statute is unconstitutional in that under the court's construction thereof, it extends the legislative powers of

the State of North Carolina into the State of Nevada and by judicial interpretation attempts to legislate what shall be a legal divorce and a legal marriage in the State of Nevada.

In Amendment XIV of the Constitution of the United States, it is provided among other things as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It cannot be doubted and is not questioned that the plaintiffs in error were citizens of the United States. It cannot be doubted that their residence in the State of Nevada was bona fide since the Court received evidence upon that question and adjudicated that the plaintiffs in error were bona fide residents and the State of North Carolina offered no evidence challenging that adjudication. If the plaintiffs in error were bona fide residents, which up until now has not been questioned by competent evidence, then the Courts of Nevada had the right to render a binding decree of divorce and likewise the Courts of Nevada had the right to issue marriage license and determine when the plaintiffs in error were legally married in that State.

In the case of *Connolly* v. *Union Sewer Pipe Company*, 46 Lawyers Edition 679, this Court held that the State has undoubtedly the power by appropriate legislation to protect the public health and public safety, if, by their necessary operations, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws they must be deemed unconstitutional and void.

It is to be observed that the North Carolina statute involved, to-wit, Appendix I, creates a crime unknown to the common law without any regard to the intent of the parties and said statute is therefore unconstitutional. In *Ratcliff* v. *The State of Texas*, 289 S. W. 1072, it is held that a statute creating an offense from an act without respect to

the intention of the parties is unconstitutional and invalid.

The plaintiffs in error further contend that the statute, to-wit, Appendix I, under which they are indicted, does not apply to them for the reason that under the specific terms of said statute, persons lawfully divorced are not within the provision of said statute; that the legality of their divorce obtained in Nevada pursuant to and in accordance with the laws of Nevada, has not been challenged or questioned in any manner by the State of North Carolina other than the arbitrary and peremptory instructions of the trial court to the effect that the Nevada decrees were void as a matter of law. This instruction extends the provisions of the statute and the judicial decrees of North Carolina to the State of Nevada and answers arbitrarily and negatively the legality of Nevada laws and that such extension of legislative power is unconstitutional under and by virtue of the provisions of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs in error contend that this court should so hold.

Social Aspects of the Question Involved.

In Vreeland on "Validity of Foreign Divorce Decrees, 1938" at page 25, it is stated:

> "The question of divorce jurisdiction in the United States seems to be considered one of difficulty and confusion. While the more recent cases as a rule do not go deeply into the theory of the matter, not infrequently one sees articles and hears discussions stressing the complexity of the problem and ending with a statement to the effect that the Supreme Court of the United States should declare whether a divorce suit is *one in personam or in rem.*"

The above quotation poses the question for this Court in the most apt language that the plaintiffs in error have been able to discover.

A decision by this Court sustaining the opinion of the Supreme Court of North Carolina would create havoc among literally thousands of married couples throughout the United States. To sustain this opinion can conceivably result in laws and judicial interpretation of laws in various states so that couples will be legally married in one state and living in adultery in all of the other states to which they might perchance travel.

To sustain this opinion will completely upset property rights and the marital status of thousands of couples throughout the United States.

It is a matter of which the Court should take judicial notice that many people, there being no statutory prohibition, have established residences in states with the more liberal divorce laws and there obtained divorce and later remarriage. Many children have been born to such unions and property rights have become vested by reason of the death of one or both of the parents and to sustain the opinion of the Supreme Court of North Carolina would not only declare illegal these marriages, but would bastardize the children born to said marriages and completely undermine the vested property rights of many American citizens who have been born, reared, and have inherited property from their respective parents under exactly the same situation as presented in the case at bar.

The State of North Carolina argues that it is against the public morals of said State to recognize the validity of a foreign divorce decree and many authorities are cited to that effect. The State of North Carolina, however, fails to recognize that in the cases cited by it, the question involved and litigated therein is a question *in personam* concerning which the foreign court did not attempt and could not litigate without jurisdiction of the right *in personam* by bringing both of the parties within the jurisdiction of the foreign court.

It is probably argued that the foreign court rendering the divorce decree could not acquire jurisdiction of the marital relationship unless both parties subjected themselves to the jurisdiction of the court rendering the decree. This reasoning is fallacious in that the marital relationship is a status and that status accompanies each individual wherever that individual may establish a residence and it is not necessary therefore to have both parties within the jurisdiction of the court in order to adjudicate that status.

The anomaly of the situation is this. Suppose that two people from New York, Maryland, Virginia or any other State, had procured divorces in the State of Nevada, Arkansas, Virginia, or any other State in the Union, and had intermarried with each other and were traveling through North Carolina and perchance stopped at a hotel. Under the decision of the North Carolina Supreme Court such people might be indicted for bigamous cohabitation and sentenced to serve a term in the State's Prison of North Carolina. Likewise persons who have been divorced and married under similar circumstances outside the State of North Carolina might perchance decide to establish permanent residence in North Carolina, and upon the establishment of such residence under North Carolina interpretation of the statute set forth in Appendix I, such persons could be indicted and convicted of bigamous cohabitation.

One of the questions, therefore, that this Court should consider most carefully with respect to public morals is whether or not it should declare illegal many thousands of marriages and bastardize many thousands of children when the children born of previous marriages cannot be affected by the decision of the Court since they were born in lawful wedlock. WHY DESTROY THE LEGITIMACY AND PROPERTY RIGHTS OF CHILDREN BORN TO THE SECOND UNION WHEN SUCH DESTRUCTION WILL IN NO WISE ENHANCE THE RIGHTS OR

PRIVILEGES OF CHILDREN BORN TO THE FIRST MARRIAGE?.

Is it not better to recognize the validity of the foreign divorce decree and the foreign marriage, and therefore, maintain the integrity and union of thousands of homes as well as extend legitimacy and property rights of children born to the second marriage?

It is, therefore, respectfully submitted by the plaintiffs in error that this honorable Court should decree that a divorce action is one *in rem;* that such action being one *in rem,* service by publication is valid and effective insofar as it affects the marital status and that the Nevada decrees involved in this controversy should be recognized by the State of North Carolina under the full faith and credit clause and other pertinent provisions of the Constitution of the United States cited herein, and that the opinion rendered by the Supreme Court of North Carolina as appears in the record on page 55 should be reversed; that these plaintiffs in error should be set at liberty.

Respectfully submitted,

W. H. Strickland,
Lenoir, N. C.,
Harry F. Gillis,
Washington, D. C.

APPENDIX I.

Section 4342 of the North Carolina Code: If any person, being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; *nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage;* nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

APPENDIX II.

Section 484 of the North Carolina Code: Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be

made by publication of a notice in either of the following cases:

5—Where the action is for divorce.

APPENDIX III.

NEVADA LAW. SECTION 8582 SERVICE OF PROCESS OUTSIDE OF NEVADA WHEN BY PUBLICATION.

Section 84: When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

Provided, that when said affidavit is based on the fact that the party on whom service is to be made resides out of the state, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which such party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and it shall not be necessary to use due or any diligence to find such party in this State, or to show by affidavit that

due or any diligence was so used. As Amended, Stats. 1923, 275.

Section 2. Section 85 of an act entitled "An act to regulate proceedings in civil cases in this State, and to repeal all other acts in relation thereto," approved March 17, 1911, is hereby amended so as to read as follows:

"Section 85: The order shall direct the publication to be thereof, for a period of four weeks, and at least once a week during said time. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the post office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to completed service by publication and deposit in the post office, and the person so served shall have thirty days after said service to appear and answer or demur. The service of the summons shall be deemed complete in cases of publication at the expiration of four weeks from the first publication, and in cases when a deposit of a copy of the summons and complaint in the post office is also required, at the expiration of four weeks from such deposit. As Amended Stats. 1931, 159.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

No. ~~979~~ 29

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 979

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The petitioners seek a writ of certiorari to bring up for review a criminal case tried in the Superior Court of Caldwell County, North Carolina, in which they were convicted of bigamous cohabitation in violation of Section 4342 of the Consolidated Statutes of North Carolina. The conviction was affirmed by the Supreme Court of North Carolina in an opinion filed December 10, 1941, which is reported as *State* v. *O. B. Williams and Lillie Shaver Hendrix*, 220 N. C. 445.

Facts

The petitioners were indicted for bigamous cohabitation under Section 4342 of the Consolidated Statutes of North Carolina, the pertinent provision of which is as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The evidence showed that on May 30, 1916, the petitioner, O. B. Williams, was married to Carrie Wyke Williams, and that they lived together as husband and wife in Caldwell County, North Carolina, until about May 7, 1940. (R. 3). It was also shown that the petitioner, Lillie Shaver Hendrix, was married to Thomas Hendrix about twenty years prior to this action and that they lived together as husband and wife in Caldwell County, North Carolina, until May, 1940. (R. 3).

On August 26, 1940, O. B. Williams obtained a decree of divorce from the bonds of matrimony from his wife, Carrie Williams, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. (R. 34). In this divorce action Carrie Williams was not personally served with process in the State of Nevada and made no appearance, although she was served with summons in North Carolina by the Sheriff of Caldwell County, North Carolina. (R. 33).

On October 4, 1940, a decree of divorce was entered in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark dissolving the bonds of matrimony subsisting between the petitioner, Lillie Hendrix, and Thomas Hendrix. (R. 16). In this action, Thomas Hendrix, was served by publication (R. 15-16), but he was not personally served within the State of Nevada and made no appearance.

Both Carrie Williams and Thomas Hendrix were domiciled in North Carolina at the time of these divorce actions.

On October 4, 1940, the petitioners, O. B. Williams and Lillie Shaver Hendrix, contracted a marriage in Las Vegas, Nevada. (R. 4). Thereafter, they returned to North Carolina, lived together as man and wife, and established a home in Pineola, North Carolina. (R. 7).

The trial of this case proceeded upon the theory that, under the Constitution of the United States, the Courts of North Carolina are not obliged to recognize divorce decrees obtained in another state against North Carolina defendants when the other state is not the state of matrimonial domicile and the North Carolina defendants are not personally served with process in the State where the divorce decrees are granted. The North Carolina Supreme Court accepted this view of the case and held that the Nevada divorce decrees and the Nevada marriage did not constitute a defense to this prosecution.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE FEDERAL QUESTIONS PRESENTED HAVE ALREADY BEEN DECIDED ADVERSELY TO THE PETITIONERS

It is not disputed that federal questions, *viz.*, whether the Nevada divorce decrees were entitled to recognition in North Carolina under Article IV, Section 1, and Amendment 14 of the Constitution of the United States, were decided in the trial of this case in the State Court. However, under the rules of this Court review on writ of certiorari is a matter not of right but of discretion. The fact that the federal questions decided in the State Court have previously been decided adversely to the contentions of the petitioners is a sufficient reason for denying the writ.

The single question presented by this case is whether a decree of divorce granted in a state which is not the state of matrimonial domicile, in which the defendant is not domiciled, and in which the defendant is not personally served with process and makes no appearance is entitled to obligatory recognition in other states. If this question is to be answered in the affirmative, the Nevada divorces and subsequent marriage of the petitioners constituted a defense to the prosecution in North Carolina. Otherwise, they did not.

It is respectfully submitted that this question has been answered in the negative by the decision of this Court in *Haddock* v. *Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867. In that case, an action had been brought in New York by a wife to obtain a legal separation from bed and board and alimony from her husband. The husband set up as a defense a divorce obtained by him in Connecticut. It was found as a fact that the marriage had been celebrated in New York, that the husband had abandoned the wife in New York, and that he had established a domicile and obtained a divorce in

Connecticut, the wife in New York being served only by publication. The New York Court held that the Connecticut divorce was not a bar to the action, and the United States Supreme Court held that this was correct as, under the circumstances, the Constitution did not require that full faith and credit be given the decree. A divorce granted in a state where the plaintiff alone is domiciled with service by publication or some form of substituted service but without personal service on the defendant may be operative in the state granting the divorce, but it need not be recognized in other states.

The divorces obtained by the petitioners in actions in Nevada against North Carolina citizens, with service by publication in one case and personal service outside the state in the other, clearly come within the scope of *Haddock* v. *Haddock*, and recognition is not required by the Federal Constitution. Inasmuch as the North Carolina courts are not required to recognize the divorce decrees, they are equally at liberty to deny the validity in North Carolina of the subsequent Nevada marriage.

The case of *Haddock* v. *Haddock* cannot be distinguished, as suggested by the petitioners, on the ground that it was concerned only with property rights. The action in that case was to obtain a legal separation, which directly presented the question whether the marriage ties between the plaintiff and defendant subsisted in New York or had been destroyed by the Connecticut decree. The existence of the marital status, itself, was involved, not merely rights *in personam*.

The case of *Davis* v. *Davis*, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. ed. 26, cited by petitioners, is not at variance with the decision of the North Carolina Supreme Court in the instant case. In that case, it was merely held that a defendant who appeared and actively contested the jurisdiction of a foreign court could not collaterally attack the finding by such court that jurisdictional facts existed. The defendants in the di-

vorce actions instituted by petitioners in Nevada made no appearance at all.

Atherton v. *Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794, is not in point, for the divorce decree in that case was granted in the state of matrimonial domicile.

In *Loughran* v. *Loughran*, 292 U. S. 216, 54 Sup. Ct. 684, 78 L. ed. 1219, it was merely held, as a matter of local policy, that a foreign marriage valid in the state in which it was celebrated would be recognized in the District of Columbia, although one of the parties, under a divorce decree obtained in the District of Columbia, could not have been validly married in the District. The decision with respect to the marriage is not based on the full faith and credit clause.

State decisions, cited by the defendant, in which recognition is given to foreign *ex parte* divorce decrees are not in point, as under *Haddock* v. *Haddock*, a state may, but is not required, to recognize a divorce decree obtained in a state other than that of matrimonial domicile and in which the defendant is not personally served and makes no appearance.

Respectfully submitted,

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Assistant Attorney General.

GEORGE B. PATTON,
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Counsel for State of North Carolina, Respondent.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,

Petitioners,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

No. 29

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

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Attorney General.

HUGHES J. RHODES,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners.

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 29

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

STATEMENT OF THE CASE

The petitioners were tried in the Superior Court of Caldwell County, North Carolina, and convicted of bigamous cohabitation, a criminal offense under Section 4342 of the Consolidated Statutes of North Carolina. The conviction was affirmed by the Supreme Court of North Carolina in an opinion filed December 10, 1941, which is reported as *State v. O. B. Williams and Lillie Shaver Hendrix*, 220 N. C. 445. A petition for writ of *certiorari* from the United States Supreme Court to the Supreme Court of North Carolina was granted March 30, 1942.

FACTS

The petitioners were indicted for bigamous cohabitation under Section 4342 of the Consolidated Statutes of North Carolina, the pertinent provision of which is as follows:

> "If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The evidence showed that on May 10, 1916, the petitioner, O. B. Williams, was married to Carrie Wyke Williams, and that they lived together as husband and wife in Caldwell County, North Carolina, until about May 7, 1940 (R. 3). It was also shown that the petitioner, Lillie Shaver Hendrix, was married to Thomas Hendrix about twenty years prior to this action and that they lived together as husband and wife in Caldwell County, North Carolina, until May, 1940 (R. 3).

On August 26, 1940, O. B. Williams obtained a decree of divorce from the bonds of matrimony from his wife, Carrie Williams, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark (R. 34). In this divorce action Carrie Williams was not personally served with process in the State of Nevada and made no appearance, although she was served with summons in North Carolina by the Sheriff of Caldwell County, North Carolina (R. 33).

On October 4, 1940, a decree of divorce was entered in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark dissolving the bonds of matrimony subsisting between the petitioner, Lillie Hendrix, and Thomas Hendrix (R. p. 16). In this action, Thomas Hendrix was served by publication (R. 15, 16), but he was not personally served within the State of Nevada and made no appearance.

Both Carrie Williams and Thomas Hendrix were domiciled in North Carolina at the time of these divorce actions.

On October 4, 1940, the petitioners, O. B. Williams and Lillie Shaver Hendrix, contracted a marriage in Las Vegas, Nevada (R. 4). Thereafter, they returned to North Carolina, lived together as man and wife, and established a home in Pineola, North Carolina (R. 7).

The trial of this case proceeded upon the theory that, under the Constitution of the United States, the courts of North Carolina are not obliged to recognize divorce decrees obtained in another state against North Carolina defendants when the other state is not the state of matrimonial domicile and the North Carolina defendants are not personally served with process in the state where the divorce decrees are granted. The North Carolina Supreme Court accepted this view of the case and held that the Nevada divorce decrees and the Nevada marriage did not constitute a defense to this prosecution.

ARGUMENT

In answering the arguments of the petitioners in this case, no attempt will be made by the State of North Carolina to discuss specific exceptions. The theory upon which the case was tried in the Superior Court of Caldwell County and affirmed in the Supreme Court of North Carolina was that the courts of North Carolina are not obliged to recognize divorce decrees obtained in another state against North Carolina defendants when the other state is not the state of matrimonial domicile and the North Carolina defendants are not personally served with process in the state where the divorce decrees are granted. All of the exceptions brought forward by the petitioners and all of the arguments advanced in the Brief for Petitioners are designed to question this theory of the law.

I

IT IS IMMATERIAL WHETHER A DIVORCE ACTION IS AN ACTION *IN REM*, FOR EVEN IN ACTIONS *IN REM* THE COURT MUST HAVE JURISDICTION AND CONTROL OVER THE *RES* OR STATUS INVOLVED.

The issues presented by this case cannot, as the petitioners suggest, be decided simply by determining whether an action for divorce is an action *in rem*. It is true that divorce actions have traditionally been regarded as proceedings *in rem*, the marital status constituting the *res*. However, there is no particular magic about the words *in rem*. Regardless of the classification that is given to an action, a court cannot render a valid judgment unless it has jurisdiction.

Even in a proceeding *in rem*, a court is without authority to proceed unless it has jurisdiction and control over the *res* involved.

Pennoyer v. *Neff*, 95 U. S. 679, 24 L. ed. 565;
Freeman v. *Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372;

Dewey v. Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. ed. 665.

In 34 C. J., Sec. 1661, p. 1171, it is said that:

> "Jurisdiction to render a judgment *in rem* rests upon the seizure or attachment of the property affected or the court's dominion or authority over the status in controversy. It is essential that the *res* be within the jurisdiction of the court at the time of the commencement of the action; that some process of the court shall have been served upon it; and that it shall have been brought within the direct control of the court."

To argue, as the petitioners do, that a divorce decree based on service by publication is entitled to recognition in all the states merely because the proceeding is *in rem* is to overlook completely the important role of domicile, in determining a state's jurisdiction over the marital status. The subject matter of an action for divorce is the marital status of the parties. This status is given localization by the domicile of the parties, the state most vitally concerned with the protection and preservation of the relationship being the state in which the parties live. If both parties to a marriage live in the same state, the marital status is clearly localized there, and a divorce may be granted in that state. A state which is the state of matrimonial domicile, *i.e.*, the state in which the parties last lived together as man and wife, may also grant a divorce which is entitled to recognition in all states, even though the defendant is not domiciled there.

Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794.

On the other hand, a state in which neither husband nor wife is domiciled and which has not been the matrimonial domicile cannot grant a divorce which other states will be obliged to recognize.

Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366.

The divorce decrees upon which the petitioners rely as a defense to the criminal prosecution in North Carolina were granted in Nevada. Although the claim of the petitioners to have been domiciled in Nevada at the time they obtained their divorce decrees appears to be somewhat colorable, there is probably enough evidence in the Record to require that they be considered, for purposes of this appeal, to have been actually domiciled in Nevada. Nevada, however, was not the state of matrimonial domicile. The defendants in the Nevada actions were domiciled in North Carolina, and they were not personally served with process in Nevada and made no appearance there. The real question presented by this appeal is not whether a divorce action is a proceeding *in rem*. More properly it is a question of the recognition to which a divorce decree is entitled when rendered in a state in which the plaintiff alone is domiciled and in which the defendant makes no appearance and is not personally served with process.

II

THE NORTH CAROLINA COURT WAS NOT REQUIRED UNDER ARTICLE IV, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES TO GIVE FULL FAITH AND CREDIT TO THE NEVADA DIVORCE DECREES.

No question arises upon this appeal as to the validity of the Nevada divorce decrees awarded to the petitioners so long as the effect of the decrees is confined to the State of Nevada. In *Haddock v. Haddock*, 201 U. S. 562, 572, 26 Sup. Ct. 525, 528, 50 L. ed. 867, 870, the United States Supreme Court has suggested that an *ex parte* divorce granted in a state where the plaintiff alone is domiciled may be valid in that State although recognition is not required elsewhere. It is rather generally understood that questions as to the validity of a divorce within the borders of the state in which it is granted and of the recognition required in other

states under Article IV, Section 1, of the United States Constitution are not the same.

Hellmuth v. Hellmuth, 98 F. (2d) 431 (App. D. C.), *cert. denied* 305 U. S. 597, 59 Sup. Ct. 92, 83 L. ed. 378; *Tyson v. Tyson*, 219 N. C. 617, 14 S.E. (2d) 673; 27 C. J. S., Sec. 333, p. 1296.

The petitioners, indicted for bigamous cohabitation under Section 4342 of the Consolidated Statutes of North Carolina, have relied for a defense upon divorce decrees granted them in the State of Nevada. The North Carolina courts have denied recognition to these decrees on the ground that Nevada was not the state of matrimonial domicile and the North Carolina defendants were not personally served with process in Nevada and made no appearance. The action of the North Carolina courts was in accord with the settled policy of the State not to recognize foreign *ex parte* divorces.

Irby v. Wilson, 21 N. C. 568;
Harris v. Harris, 115 N. C. 587, 20 S.E. 187;
Pridgen v. Pridgen, 203 N. C. 533, 166 S.E. 591;
Tyson v. Tyson, 219 N. C. 617, 14 S.E. (2d) 673.

The North Carolina courts having denied recognition to the Nevada divorces, the single question presented by this case is whether a decree of divorce granted in a state which is not the state of matrimonial domicile, in which the defendant is not domiciled, and in which the defendant is not personally served with process and makes no appearance is entitled to full faith and credit in other states under Article IV, Section 1, of the United States Constitution. If this question is to be answered in the affirmative, the Nevada divorces and subsequent marriage of the petitioners constituted a defense to the prosecution in North Carolina. Otherwise, they did not.

It is respectfully submitted that this question has been answered adversely to the contentions of the petitioners by the decision of

this Court in *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867. In that case, an action had been brought in New York by a wife to obtain a legal separation from bed and board and alimony from her husband. The husband set up as a defense a divorce obtained by him in Connecticut. It was found as a fact that the marriage had been celebrated in New York, that the husband had abandoned the wife in New York, that he had established a domicile in Connecticut, and that he had obtained a divorce in the latter state with the wife in New York being served only by publication. The New York court held that the Connecticut divorce was not a bar to the action, and the United States Supreme Court held that this was correct as, under the circumstances, the Constitution did not require that full faith and credit be given the decree. A divorce granted in a state where the plaintiff alone is domiciled with service by publication or some form of substituted service but without personal service on the defendant may be operative in the state granting the divorce, but it need not be recognized in other states.

Attention is also called to the recent case of *Durlacher v. Durlacher*, 123 F. (2d) 70 (C.C.A. 9th). A husband and wife were domiciled in the State of New York. The husband went to Nevada and obtained an absolute divorce from his wife without her making an appearance or being personally served with process in the State. Subsequently, a judgment was rendered in New York in favor of the wife in a suit against the husband for maintenance. When suit was brought by the wife in a Federal district court in Nevada on the New York judgment, the husband contended, among other things, that the New York judgment was not valid because it had been rendered after the husband obtained an absolute divorce in Nevada. The Ninth Circuit Court of Appeals held that the New York judgment was entitled to the same recognition as it would receive in New York, since the New York court had jurisdiction over the person of both parties. The New York judgment was entitled to full faith and credit because there was no way in New York by which it could be modified or set aside on account of the

Nevada divorce. The Nevada divorce, being obtained without personal service upon or an appearance by the wife, was not entitled to obligatory recognition in New York, and it would not be recognized under the decisions of the state courts. *Certiorari* in this case was denied by the United States Supreme Court on February 9, 1942. *Durlacher v. Durlacher*, 86 L. ed. Adv. Ops. 563.

In *Restatement, Conflict of Laws* (1934), Sec. 113, the conditions under which a state where only one spouse is domiciled may grant a valid divorce are outlined as follows:

> "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if
>
> "(a) The spouse who is not domiciled in the state
>
> "(i) has consented that the other spouse acquire a separate home; or
>
> "(ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or
>
> "(iii) is personally subject to the jurisdiction of the state which grants the divorce; or
>
> "(b) the state is the last state in which the spouses were domiciled together as man and wife."

There may be some doubt, at least for purposes of the full faith and credit clause, whether conditions (i) and (ii) of Sec. 113 of the *Restatement* are supported by the decision of this Court in *Haddock v. Haddock*. However that may be, there is no evidence in the Record, and the petitioners have not contended before the North Carolina Supreme Court or in their briefs in this Court, that their respective spouses consented to their acquiring a home in Nevada or that their spouses were guilty of any misconduct.

Therefore, on the facts of this case, under the decision of this Court in *Haddock v. Haddock*, under the decision in *Durlacher v. Durlacher*, which this Court declined to review by *certiorari*, and according to Sec. 113 of the *Restatement* of *Conflict of Laws*, the Nevada divorce decrees upon which the petitioners rely were not

entitled to recognition in North Carolina under Article IV, Section 1, of the Constitution of the United States.

III

THE AUTHORITIES CITED BY THE PETITIONERS ARE NOT CONTROLLING.

In the Brief for Petitioners certain authorities are cited in support of the argument that the Nevada divorce decrees are entitled to full faith and credit which, as the State of North Carolina understands them, are not controlling.

For instance, the petitioners contend that the case of *Davis v. Davis*, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. ed. 26, holds that if a decree of divorce is valid in the jurisdiction rendering it, it must be given full force and effect in every other jurisdiction. Two important features which distinguish *Davis v. Davis* from the case at bar suggest themselves immediately. First, the Court was dealing with the effect to be given to a Virginia divorce decree in the District of Columbia where, as a matter of local policy, a foreign divorce decree may be recognized by comity although it is not entitled to full faith and credit. *Hellmuth v. Hellmuth*, 98 F. (2d) 431 (App. D. C.), *cert. denied* 305 U. S. 597, 59 Sup. Ct. 92, 83 L. ed. 378. Second, the defendant in the Virginia action made an appearance and was bound by the findings of the Virginia court as to matters which she actively contested. It is respectfully submitted that *Davis v. Davis* does not overrule the decision of this Court in *Haddock v. Haddock* and that it is not at variance with the decision of the North Carolina Supreme Court under consideration.

In *Loughran v. Loughran*, 292 U. S. 216, 54 Sup. Ct. 684, 78 L. ed. 1219, cited by petitioners, it was merely held, as a matter of comity, that a foreign marriage valid in the state in which it was celebrated would be recognized in the District of Columbia, although one of the parties, under a divorce decree obtained in the District of Columbia, could not have been validly married in the

District. The decision with respect to the marriage is not based on the full faith and credit clause, and it is not concerned with jurisdiction to grant divorces.

Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794, is not in point, for the divorce decree granted in that case was granted in the state of matrimonial domicile. There is nothing in the Record to suggest that the matrimonial domicile of the petitioners was in Nevada at the time they secured their divorces.

Faris v. Hope, 298 Fed. 727 (C. C. A. 8th), merely held that the date from which a divorce decree, rendered in a state in which both husband and wife were domiciled, became effective, would be determined by the law of the state in which the divorce was granted. The case was not even remotely concerned with the requirements of the full faith and credit clause when a divorce is granted in a state in which the plaintiff alone is domiciled.

The case of *Frey v. Frey*, 59 F. (2d) 1046 (App. D. C.), does not support the contentions of the petitioners, for it was only held that a divorce obtained in Virginia was void for want of jurisdiction when both husband and wife were domiciled in the District of Columbia.

The statute cited by the petitioners, 28 U. S. C. A., Sec. 687, which is concerned with authentication of judicial proceedings, is not controlling. This statute does not require recognition of a foreign judgment unless the court which rendered it had jurisdiction to render a judgment entitled to full faith and credit under Article IV, Section 1, of the United States Constitution.

IV

THE PETITIONERS HAVE NOT BEEN DEPRIVED OF THE PRIVILEGES AND IMMUNITIES GUARANTEED BY ARTICLE IV, SECTION 2, OF THE CONSTITUTION OF THE UNITED STATES.

Article IV, Section 2, Clause 1, of the Constitution, provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The petitioners contend that the State of North Carolina, by refusing to recognize their Nevada divorces and subsequent marriage and by prosecuting them for bigamous cohabitation in consequence of their living together in North Carolina, has deprived them of privileges guaranteed to them as citizens of Nevada.

In connection with this argument advanced by the petitioners, it it appropriate to remember the words of Mr. Justice Field, who observed in *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. ed. 357, 360:

> "But the privileges and immunities secured to citizens of each state in the several states, by the provisions in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not ifitended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other stafes to their enjoyment therein be given."

All that the constitutional provision in question requires is that a particular state not discriminate against citizens of other states; that the privileges granted to local citizens be also granted to citizens of other states. If the petitioners were in fact citizens of Nevada at the time they established a home and lived together as man and wife in Pineola, North Carolina (R. 7), nevertheless, there has been no discrimination against them. The State of North Carolina does not grant to its own citizens the privilege of living together as man and wife when they have not been legally married. The State is not required to grant to citizens of another state the privilege of living together as man and wife when under the laws of North Carolina consistent with the Constitution of the United States they have not been divorced from North Carolina spouses and are not legally married to each other.

Whatever the effect of the divorce decrees obtained by the petitioners within the borders of the State of Nevada, the decrees need

not be recognized in North Carolina. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867. Therefore, any privileges acquired by the petitioners in consequence of their Nevada divorces were special privileges peculiar to the State of Nevada. These privileges are not guaranteed to the petitioners in North Carolina.

V

THE NORTH CAROLINA STATUTE UNDER WHICH PETITIONERS WERE PROSECUTED IS NOT UNCONSTITUTIONAL.

The petitioners were convicted of bigamous cohabitation in violation of Section 4342 of the Consolidated Statutes of North Carolina, the pertinent provision of which reads as follows:

> "If any person, being married, shall contract a marriage with any other person out-side of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The assertion that this statute is unconstitutional comes for the first time in this Court. No such suggestion was made in the Supreme Court of North Carolina or in the *Petition for Writ of Certiorari*.

If the attack upon the validity of the North Carolina statute is to be considered as incidental to the argument that North Carolina was required to recognize the Nevada divorce decrees under the full faith and credit clause, it seems a sufficient answer to say that recognition was not required under *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, and the other authorities cited and discussed.

If the petitioners intend to make a general attack upon the statute, it is believed that such arguments should not be considered

in this Court, no such attack having been made in the state courts or in the *Petition for Writ of Certiorari*.

Dewey v. Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. ed. 665;
Cox v. Texas, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. ed. 1099;
Rorick v. Devon Syndicate, 307 U. S. 299, 59 Sup. Ct. 877, 83 L. ed. 1303.

It can hardly be questioned that the police power of a state is sufficiently broad to allow the enactment of legislation designed for the protection of a relationship so intimately connected with the public health, safety and morality as the marital relationship. It can hardly be questioned that a state can validly enact laws providing for the punishment of those who, without being legally married according to the laws of the state, live and cohabit together as man and wife. Such is the purpose of the provision of Section 4342 of the Consolidated Statutes of North Carolina now under consideration.

The statute is not, as contended by the petitioners, extra-territorial in its operation. The North Carolina Supreme Court has recognized the inability of the state to punish for bigamy persons who are parties to a marriage ceremony celebrated outside the State. *State v. Barnett*, 83 N. C. 615. But the conduct which the statute in question prohibits is the cohabitation which takes place within the borders of North Carolina. The Supreme Court of North Carolina held this statute constitutional in *State v. Moon*, 178 N. C. 715, 100 S.E. 614. In writing the opinion Justice Brown stated:

> "It is further contended that the amendment of 1913 is unconstitutional inasmuch as its effect is to punish the defendant for a crime committed outside of the territorial limits of the State. This contention cannot be sustained. It is an offense committed in North Carolina called bigamous cohabitation. Similar statutes have been enacted in the states of Alabama, Iowa, Massachusetts, Minnesota, Missouri, Ten-

nessee, and Vermont, and in each of these states they have been sustained.

"In Alabama, *Cox v. State*, 117 Ala., 103; 67 Am. S. R., 166; 41 L. R. A., 760.

"In Iowa, *S. v. Stevpper*, 117 Iowa, 591. *S. v. Sloan*, 55 *ib.*, 217.

"In Massachussets, *Com. v. Bradley*, 2 Cush., 553.

"In Minnesota, *S. v. Johnson*, 12 Min., 467, 93 Am. D., 241.

"In Missouri, *S. v. Stewart*, 194 Mo., 345; 5 Ann. Cas., 963.

"In Tennessee, *Kenneval v. State*, 107 Tenn., 581.

"In Vermont, *S. v. Palmer*, 18 Vt., 570."

VI

THE QUESTIONS OF POLICY POSED BY THE PETITIONERS ARE MATTERS WHICH OUGHT TO BE DECIDED BY THE STATE COURTS.

The petitioners argue at considerable length that the judgment of the Supreme Court of North Carolina ought to be reversed because it is bad social policy for recognition to be denied to foreign divorce decrees. It is contended that havoc will be created "among literally thousands of married couples throughout the United States" if it is held that the Nevada divorce decrees in question are not entitled to full faith and credit.

Whatever havoc and consternation might arise among married couples if the judgment of the Supreme Court of North Carolina should be affirmed would be the direct result of disregard for the law as it has been declared by our courts for many years. It will be no innovation to hold that a divorce granted in a state where only the plaintiff is domiciled and in which the defendant is not personally served and makes no appearance is not entitled to full faith and credit. North Carolina has denied recognition to such *ex parte* divorces since 1837, *Irby v. Wilson*, 21 N. C. 568; and it has been thirty-six years since the Supreme Court of the United States held they were not entitled to full faith and credit in *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867.

If the decision of this case involves matters of policy, it is to be remembered that there are arguments based on policy which may be appropriately advanced by both sides. The dissolution of the bonds of matrimony is a serious matter. Surely no one will contend that respect for the sanctity of the marital relationships is engendered by the unseemly spectacle of married persons, upon sudden or trivial provocation, departing from the state of their domicile, establishing a fictitious residence for the sole purpose of getting a divorce, and securing a decree in a state which operates "divorce mills" as a commercial racket and which is usually so far away as to make it inconvenient for the other spouse to make an appearance. Who can say whether the greater wisdom is in the policy of protecting the marital status of those who have relied on foreign divorces or in the policy of compelling respect for the seriousness of marriage and discouraging its hasty dissolution through non-recognition of *ex parte* migratory divorces?

It is earnestly contended by the State of North Carolina that these matters of policy are questions which should be left to the courts and legislatures of the various states and that the Supreme Court of the United States should concern itself merely with the essentials of jurisdiction for purposes of the full faith and credit clause. The Supreme Court does not need to be reminded of the unwisdom of permitting matters of local policy to be decided by the Federal courts.

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188, *overruling Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865.

Respectfully submitted,

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Jackson J. pp. 3, 8 + 9

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1942.

O. B. Williams and Lillie Shaver Hendrix, Petitioners,
vs.
The State of North Carolina.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 21, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners were tried and convicted of bigamous cohabitation under § 4342 of the North Carolina Code,[1] 1939, and each was sentenced for a term of years to a state prison. The judgment of conviction was affirmed by the Supreme Court of North Carolina. 220 N. C. 445. The case is here on certiorari.

Petitioner Williams was married to Carrie Wyke in 1916 in North Carolina and lived with her there until May, 1940. Petitioner Hendrix was married to Thomas Hendrix in 1920 in North Carolina and lived with him there until May, 1940. At that time petitioners went to Las Vegas, Nevada and on June 26, 1940, each filed a divorce action in the Nevada court. The defendants in those divorce actions entered no appearance nor were they served with process in Nevada. In the case of defendant Thomas Hendrix service by publication was had by publication of the summons in a Las Vegas newspaper and by mailing a copy of the summons and complaint to his last post office address.[2] In the case of defendant Carrie Williams a North Carolina sheriff delivered to her in North Carolina a copy of the summons and complaint. A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the grounds of extreme cruelty, the

[1] Sec. 4342 provides in part: "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . . ."

[2] Defendant Hendrix had written his wife's Nevada attorney, "Upon receipt of the original appearance, I will sign the same." But no appearance was entered and the North Carolina court charged the jury that a promise to make an appearance does not constitute one.

court finding that "the plaintiff has been and now is a *bona fide* and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law".[3] The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner's *bona fide* residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940. Thereafter they returned to North Carolina where they lived together until the indictment was returned. Petitioners pleaded not guilty and offered in evidence exemplified copies of the Nevada proceedings, contending that the divorce decrees and the Nevada marriage were valid in North Carolina as well as in Nevada. The State contended that since neither of the defendants in the Nevada actions was served in Nevada nor entered an appearance there, the Nevada decrees would not be recognized as valid in North Carolina. On this issue the court charged the jury in substance that a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina under the rule of *Pridgen* v. *Pridgen*, 203 N. C. 533. The State further contended that petitioners went to Nevada not to establish a *bona fide* residence but solely for the purpose of taking advantage of the laws of that State to obtain a divorce through fraud upon that court. On that issue the court charged the jury that under the rule of *State* v. *Herron*, 175 N. C. 754, the defendants had the burden of satisfying the jury, but not beyond a reasonable doubt, of the *bona fides* of their residence in Nevada for the required time. Petitioners excepted to these charges. The Supreme Court of North Carolina in affirming the judgment held that North Carolina was not required to recognize the Nevada decrees under the full faith and credit clause of the Constitution (Art. IV, § 1) by reason of *Haddock* v. *Had-*

[3] Sec. 9460, Nev. Comp. L. 1929, as amended L. 1931, p. 161, provides in part: "Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following causes, or any other causes provided by law . . . . ." Sec. 9467.02 provides that "In all civil cases where the jurisdiction of the court depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence of such residence." L. 1931, p. 277.

dock, 201 U. S. 562. The intimation in the majority opinion (220 N. C. pp. 460-464) that the Nevada divorces were collusive suggests that the second theory on which the state tried the case may have been an alternative ground for the decision below, adequate to sustain the judgment under the rule of *Bell* v. *Bell*, 181 U. S. 175—a case in which this Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled. But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover it admits that there probably is enough evidence in the record to require that petitioners be considered "to have been actually domiciled in Nevada." In the second place, the verdict against petitioners was a general one. Hence even though the doctrine of *Bell* v. *Bell*, *supra*, were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, *viz.* the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in *Stromberg* v. *California*, 283 U. S. 359, 368, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the *Stromberg* case is inapplicable here. Nor has any reason been advanced why the rule of the *Stromberg* case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights. Accordingly, we cannot avoid meeting the *Haddock* v. *Haddock* issue in this case by saying that the petitioners acquired no *bona fide* domicil in Nevada. If the case had been tried and submitted on that issue only, we would have quite a different problem, as *Bell* v. *Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another

proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicil in Nevada was a sham and a fraud. Rather we must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there. In other words, we would reach the question whether North Carolina could refuse to recognize the Nevada decrees because in its view and contrary to the findings of the Nevada court petitioners had no actual, *bona fide* domicil in Nevada, if and only if we concluded that *Haddock* v. *Haddock* was correctly decided. But we do not think it was.

The *Haddock* case involved a suit for separation and alimony brought in New York by the wife on personal service of the husband. The husband pleaded in defense a divorce decree obtained by him in Connecticut where he had established a separate domicil. This Court held that New York, the matrimonial domicil where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicil, service on her having been obtained by publication and she not having entered an appearance in the action. But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned,[4] a decree of divorce granted under such circumstances by one state need not be given full faith and credit in another.

Article IV, § 1 of the Constitution not only directs that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State" but also provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U. S. C. 687, Congress has provided that judgments "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." Chief Justice Marshall stated in *Hampton* v. *M'Connel*, 3 Wheat. 234, 235, that "the judgment of a state court should have the same credit, validity, and effect, in every other court in

[4] Thus we have here no question as to extraterritorial effect of a divorce decree insofar as it affects property in another state. See the cases cited, *infra*, note. 5.

the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." That view has survived substantially intact. *Fauntleroy* v. *Lum*, 210 U. S. 230. This Court only recently stated that Art. IV, § 1 and the Act of May 26, 1790 require that "not some, but full" faith and credit be given judgments of a state court. *Davis* v. *Davis*, 305 U. S. 32, 40. Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit. See *Christmas* v. *Russell*, 5 Wall. 290; *Fauntleroy* v. *Lum*, *supra*; *Kenney* v. *Supreme Lodge*, 252 U. S. 411; *Titus* v. *Wallick*, 306 U. S. 282, 291. Some exceptions have been engrafted on the rule laid down by Chief Justice Marshall. But as stated by Mr. Justice Brandeis in *Broderick* v. *Rosner*, 294 U. S. 629, 642, "the room left for the play of conflicting policies is a narrow one." So far as *judgments* are concerned the decisions,[5] as distinguished from dicta,[6] show that the actual exceptions have been few and far between, apart from *Haddock* v. *Haddock*. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the courts of a sister state, since the "very purpose" of Art. IV, § 1 was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under

[5] Fall v. Eastin, 215 U. S. 1; Olmsted v. Olmsted, 216 U. S. 386; Hood v. McGehee, 237 U. S. 611. These decisions refuse to require courts of one state to allow acts or judgments of another to control the disposition or devolution of realty in the former. They seem to rest on the doctrine that the state where the land is located is "sole mistress" of its rules of real property. See Hood v. McGehee, *supra*, p. 615; and the concurring opinion of Mr. Justice Holmes in Fall v. Eastin, *supra*, p. 14.

That the case of Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, is not an exception but only an appropriate application of the doctrine of *forum non conveniens*, see Broderick v. Rosner, 294 U. S. 629, 642-643.

[6] It has been repeatedly stated that the full faith and credit clause does not require one state to enforce the penal laws of another. See, for example, Huntington v. Attrill, 146 U. S. 657, 666; Converse v. Hamilton, 224 U. S. 243, 260; Bradford Electric Co. v. Clapper, 286 U. S. 145, 160.

But the question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in Milwaukee County v. White Co., 296 U. S. 268, 279.

For other dicta that the application of the full faith and credit clause may be limited by the policy of the law of the forum see Bradford Electric Co. v. Clapper, *supra*, p. 160; Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 546; Broderick v. Rosner, *supra*, note 5, p. 642.

the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation". *Milwaukee County* v. *White Co., supra*, pp. 276-277.

This Court, to be sure, has recognized that in case of *statutes*, "the extra-state effect of which Congress has not prescribed", some "accommodation of the conflicting interests of the two states" is necessary. *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 294 U. S. 532, 547. But that principle would come into play only in case the Nevada decrees were assailed on the ground that Nevada must give full faith and credit in its divorce proceedings to the divorce statutes of North Carolina. Even then, it would be of no avail here. For as stated in the *Alaska Packers* case, "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." *Id.*, pp. 547-548. It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state. Certainly *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, did not so hold. Indeed, the recent case of *Pacific Employers Ins. Co.* v. *Industrial Accident Comm.*, 306 U. S. 493, 502, held that in the case of statutes "the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Moreover *Haddock* v. *Haddock* is not based on the contrary theory. Nor did it hold that a decree of divorce granted by the courts of one state need not be given full faith and credit in another if the grounds for the divorce would not be recognized by the courts of the forum. It does not purport to challenge or disturb the rule, earlier established by *Christmas* v. *Russell*, *supra*, and subsequently fortified by *Fauntleroy* v. *Lum*, *supra*, that even though the cause of action could not have been entertained in the state of the forum, a judgment obtained thereon in a sister state is

entitled to full faith and credit. For the majority opinion in the *Haddock* case accepted both *Cheever* v. *Wilson*, 9 Wall. 108 and *Atherton* v. *Atherton*, 181 U. S. 155. *Cheever* v. *Wilson* held that a decree of divorce granted by a state in which one spouse was domiciled and which had personal jurisdiction over the other was as conclusive in other states as it was in the state where it was obtained. *Atherton* v. *Atherton* held that full faith and credit must be given a decree of divorce granted by the state of the matrimonial domicil on constructive service against the other spouse who was a non-resident of that state. The decisive difference between those cases and *Haddock* v. *Haddock* was said to be that in the latter the state granting the divorce had no jurisdiction over the absent spouse, since it was not the state of the matrimonial domicil, but the place where the husband had acquired a separate domicil after having wrongfully left his wife. This Court accordingly classified *Haddock* v. *Haddock* with that group of cases which hold that when the courts of one state do not have jurisdiction either of the subject matter or of the person of the defendant, the courts of another state are not required by virtue of the full faith and credit clause to enforce the judgment.[7] But such differences in result between *Haddock* v. *Haddock* and the cases which preceded it rest on distinctions which in our view are immaterial, so far as the full faith and credit clause and the supporting legislation are concerned.

The historical view that a proceeding for a divorce was a proceeding *in rem* (2 Bishop, Marriage & Divorce (4th ed.) § 164) was rejected by the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action. Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance. The findings made in the divorce decrees in the instant case must be treated on the issue before us as meeting those require-

[7] Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287; National Exchange Bank v. Wiley, 195 U. S. 257; Baker v. Baker, Eccles & Co., 242 U. S. 394; Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 29; Flexner v. Farson, 248 U. S. 289.

ments. For it seems clear that the provision of the Nevada statute that a plaintiff in this type of case must "reside" in the State for the required period[8] requires him to have a domicil[9] as distinguished from a mere residence in the state. *Latterner* v. *Latterner*, 51 Nev. 285; *Lamb* v. *Lamb*, 57 Nev. 421. Hence the decrees in this case like other divorce decrees are more than *in personam* judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power. See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313; *Milliken* v. *Meyer*, 311 U. S. 457, 463-464; *Skiriotes* v. *Florida*, 313 U. S. 69. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institutiton of marriage can alter within its own borders the marriage status of the spouse domciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service (see *Milliken* v. *Meyer*, *supra*, p. 463) meet the requirements of due process. *Atherton* v. *Atherton*, *supra*, p. 172. Accordingly it was admitted in the *Haddock* case that the divorce decree though not recognized in New York was binding on both spouses in Connecticut where granted. 201 U. S. 569, 572, 575, 579. And this Court in *Maynard* v. *Hill*, 125 U. S. 190, upheld the validity within the Territory of Oregon of a divorce decree granted by the legislature to a husband domiciled there, even though the wife resided in Ohio where the husband had deserted her. It therefore follows that, if the Nevada decrees are taken at their full face value (as

[8] Sec. 9460, Nev. Comp. L. 1929, as amended L. 1931, p. 161; *supra*, note 3.

[9] The fact that a stay in a state is not for long is not necessarily fatal to the existence of a domicil. As stated in Williamson v. Osenton, 232 U. S. 619, 624, the "essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere". The intention to stay for a time to which a person "did not then contemplate an end" was held sufficient. *Id.*, p. 625. And see District of Columbia v. Murphy, 314 U. S. 441. Nor is there any doubt that a married woman may acquire in this country a domicil separate from her husband. Williamson v. Osenton, *supra*, pp. 625-626, and cases cited.

they must be on the phase of the case with which we are presently concerned), they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. Apart from the requirements of procedural due process (*Atherton* v. *Atherton, supra,* p. 172) not challenged here by North Carolina, no reason based on the Federal Constitution has been advanced for the contrary conclusion. But the concession that the decrees were effective in Nevada makes more compelling the reasons for rejection of the theory and result of the *Haddock* case.

This Court stated in *Atherton* v. *Atherton, supra,* p. 162, that "A husband without a wife, or a wife without a husband, is unknown to the law." But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. We would then have what the Supreme Court of Illinois declared to be the "most perplexing and distressing complications in the domestic relations of many citizens in the different States." *Dunham* v. *Dunham,* 162 Ill. 589, 607. Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicil so that the domicil of the other spouse follows him wherever he may go, while if he is to blame, he retains no such power. But such considerations are inapposite. As stated by Mr. Justice Holmes in his dissent in the *Haddock* case (201 U. S. p. 630) they constitute a "pure fiction, and fiction always is a poor ground for changing substantial rights." Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass. Whatever may be said as to the practical effect which such a rule would have in clouding divorce decrees, the question as to where the fault lies has no relevancy to the existence of state power in such circumstances. See Bingham, *In the Matter of Haddock* v. *Haddock,* 21 Corn. L. Q. 393, 426. The existence of the power

of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. *Atherton* v. *Atherton* which preceded *Haddock* v. *Haddock* and *Thompson* v. *Thompson*, 226 U. S. 551, which followed it, recognized that the power of the state of the matrimonial domicil to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause. Moreover, so far as state power is concerned no distinction between a matrimonial domicil and a domicil later acquired has been suggested or is apparent. See Mr. Justice Holmes dissenting, *Haddock* v. *Haddock*, *supra*, p. 631; Goodrich, Matrimonial Domicile, 27 Yale L. Journ. 49. It is one thing to say as a matter of state law that jurisdiction to grant a divorce from an absent spouse should depend on whether by consent or by conduct the latter has subjected his interest in the marriage status to the law of the separate domicil acquired by the other spouse. Beale, Conflict of Laws, § 113.11; Restatement, Conflict of Laws, § 113. But where a state adopts, as it has the power to do, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states. Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring "considerable disaster to innocent persons" and "bastardize children hitherto supposed to be the offspring of lawful marriage." (Mr. Justice Holmes dissenting in *Haddock* v. *Haddock*, *supra*, p. 628), or else encourage collusive divorces. Beale, *Constitutional Protection of Decrees for Divorce*, 19 Harv. L. Rev. 586, 596. These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity (*Broderick* v. *Rosner*,

supra, p. 643) and in altering the "status of the several states as independent foreign sovereignties" by making them "integral parts of a single nation". *Milwaukee County* v. *White Co., supra*, p. 277.

It is objected, however, that if such divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the full faith and credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overriden in *Fauntleroy* v. *Lum, supra*, when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is part of the price of our federal system.

This Court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause. *Alaska Packers Ass'n* v. *Industrial Accident Comm., supra*, p. 547; *Milwaukee County* v. *White Co., supra*, p. 274. But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada. In the second place, the question as to what is a permissible limitation on the full faith and credit clause does not involve a decision on our part as to which state policy on divorce is the more desirable one. It does not involve selection of a rule which will encourage on the one hand or discourage on the other the practice of divorce. That choice in the realm of morals and religion rests with the legislatures of the states. Our own views as to the marriage institution and the avenues of escape which some states have created are imma-

terial. It is a Constitution which we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause. Within the limits of her political power North Carolina may, of course, enforce her own policy regarding the marriage relation—an institution more basic in our civilization than any other. But society also has an interest in the avoidance of polygamous marriages (*Loughran* v. *Loughran*, 292 U. S. 216, 223) and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions. And other states have an equally legitimate concern in the status of persons domiciled there as respects the institution of marriage. So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter. Whether Congress has the power to create exceptions (see *Yarborough* v. *Yarborough*, 290 U. S. 202, 215, nt. 2, dissenting opinion) is a question on which we express no view. It is sufficient here to note that Congress in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another has not done so. And the considerable interests involved and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted to a substantial degree if the rule of *Haddock* v. *Haddock* were perpetuated.

Haddock v. *Haddock* is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1942.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 21, 1942.]

Mr. Justice Frankfurter, concurring.

I join in the opinion of the Court but think it appropriate to add a few words.

Article 91 of the British North America Act (1867) gives the Parliament of Canada exclusive legislative authority to deal with marriage and divorce. Similarly, Article 51 of the Australia Constitution Act (1900) empowers the Commonwealth Parliament to make laws with respect to marriage and divorce. The Constitution of the United States, however, reserves authority over marriage and divorce to each of the forty-eight states. That is our starting-point. In a country like ours where each state has the constitutional power to translate into law its own notions of policy concerning the family institution, and where citizens pass freely from one state to another, tangled marital situations, like the one immediately before us, inevitably arise. They arose before and after the decision in the *Haddock* case, 201 U. S. 562, and will, I daresay, continue to arise no matter what we do today. For these complications cannot be removed by any decisions this Court can make—neither the crudest nor the subtlest juggling of legal concepts could enable us to bring forth a uniform national law of marriage and divorce.

We are not authorized nor are we qualified to formulate a national code of domestic relations. We cannot, by making "jurisdiction" depend upon a determination of who is the deserter and who the deserted, or upon the shifting notions of policy concealed by the cloudy abstraction of "matrimonial domicile", turn this into a divorce and probate court for the United States. There may be some who think our modern social life is such that there is today a need, as there was not when the Constitution was framed, for vesting national authority over marriage and divorce

in Congress, just as the national legislatures of Canada and Australia have been vested with such powers. Beginning in 1884,[1] numerous proposals to amend the Constitution to confer such authority have been introduced in Congress. But those whose business it is to amend the Constitution have not seen fit to amend it in this way. The need for securing national uniformity in dealing with divorce, either through constitutional amendment or by some other means, has long been the concern of the Conference of Governors and of special bodies convened to consider this problem. See, *e. g.*, Proceedings of Governors' Conference (1910) 185-98; Proceedings of National Congress on Uniform Divorce Laws (1906). This Court should abstain from trying to reach the same end by indirection. We should not feel challenged by a task that is not ours, even though it is difficult. Judicial attempts to solve problems that are intrinsically legislative—because their elements do not lend themselves to judicial judgment or because the necessary remedies are of a sort which judges cannot prescribe—are apt to be as futile in their achievement as they are presumptuous in their undertaking.

There is but one respect in which this Court can, within its traditional authority and professional competence, contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states when the judgment was rendered in accordance with settled procedural standards. As the Court's opinion shows, it is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every other state. This rule of law was not created by the federal courts. It comes from the Constitution and the Act of May 26, 1790, c. 11, 1 Stat. 122. Congress has not exercised its power under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it.

The duty of a state to respect the judgments of a sister state arises only where such judgments meet the tests of justice and fair dealing that are embodied in the historic phrase, "due process of law". But in this case all talk about due process is beside the mark. If the actions of the Nevada court had been taken "without

[1] See Ames, Proposed Amendments to the Constitution of the United States during the First Century of its History, contained in the Annual Report of the American Historical Association, 1896, vol. II, p. 190; Sen. Doc. No. 93, 69th Cong., 1st Sess., and the successive compilations prepared by the Legislative Reference Service of the Library of Congress.

due process of law", the divorces which it purported to decree would have been without legal sanction in every state including Nevada. There would be no occasion to consider the applicability of the Full Faith and Credit Clause. It is precisely because the Nevada decrees do satisfy the requirements of the Due Process Clause and are binding in Nevada upon the absent spouses that we are called upon to decide whether these judgments, unassailable in the state which rendered them, are, despite the commands of the Full Faith and Credit Clause, null and void elsewhere.

North Carolina did not base its disregard of the Nevada decrees on the claim that they were a fraud and a sham, and no claim was made here on behalf of North Carolina that the decrees were not valid in Nevada. It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered. *Haddock* v. *Haddock*, 201 U. S. 562, 569-70; *Maynard* v. *Hill*, 125 U. S. 190; *Atherton* v. *Atherton*, 181 U. S. 155. In denying constitutional sanction to such a valid judgment outside the state which rendered it, the *Haddock* decision made an arbitrary break with the past and created distinctions incompatible with the rôle of this Court in enforcing the Full Faith and Credit Clause. Freed from the hopeless refinements introduced by that case, the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouses in the state where they were rendered. North Carolina did not challenge the power of Nevada to declare the marital status of persons found to be Nevada residents. North Carolina chose instead to disrespect the consequences of Nevada's exertion of such power. It is therefore no more rhetorical to say that Nevada is seeking to impose its policy upon North Carolina than it is to say that North Carolina is seeking to impose its policy upon Nevada.

For all but a very small fraction of the community the niceties of resolving such conflicts among the laws of the states are, in all likelihood, matters of complete indifference. Our occasional pronouncements upon the requirements of the Full Faith and Credit Clause doubtless have little effect upon divorces. Be this as it may, a court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1942.

O. B. Williams and Lillie Shaver Hendrix, Petitioners,
vs.
The State of North Carolina.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 21, 1942.]

Mr. Justice Murphy.

I dissent because the Court today introduces an undesirable rigidity in the application of the Full Faith and Credit Clause to a problem which is of acute interest to all the states of the Union and on which they hold varying and sharply divergent views, the problem of how they shall treat the marriage relation.

This case cannot be considered as one involving the Constitution alone; rather the case involves the interaction of public policy upon the Constitution. This is not to say that our function is to become censors of public morals and decide this case in accordance with what we may think is the wisest rule for society with respect to divorce. But the question of public policy enters to this degree—marriage and the family have generally been regarded as basic components of our national life; and the solution of the problems engendered by the marital relation, the formulation of standards of public morality in connection therewith, and the supervision of domestic (in the sense of family) affairs, have been left to the individual states. Each state has the deepest concern for its citizens in those matters, and concomitantly with that concern, it exercises the widest control over marriage, determining how it is to be solemnized, the attendant obligations, and how it may be dissolved. When a conflict arises between the divergent policies of two states in this area of legitimate governmental concern, as here, this Court should give appropriate consideration to the interests of each state.

In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this Court has held that actual good faith domicile of at least one party is essential to

confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit Clause, *Bell* v. *Bell*, 181 U. S. 175, even though both parties personally appear, *Andrews* v. *Andrews*, 188 U. S. 14. When the doctrine of those cases is applied to the facts of this one, the question becomes a simple one: Did petitioners acquire a bona fide domicil in Nevada? I agree with my brother Jackson that the only proper answer on the record is, no. North Carolina is the state in which petitioners have their roots, the state to which they immediately returned after a brief absence just sufficient to achieve their purpose under Nevada's requirements. It follows that the Nevada decrees are entitled to no extraterritorial effect when challenged in another state. *Bell* v. *Bell, supra; Andrews* v. *Andrews, supra.*

This is not to say that the Nevada decrees are without any legal effect in the State of Nevada. That question is not before us. It may be that for the purposes of that state the petitioners have been released from their marital vows, consistently with the procedural requirements of the Fourteenth Amendment, on the basis of compliance with its residential requirements and constructive service of process on the non-resident spouses. But conceding the validity in Nevada of its decrees dissolving the marriages, it does not mechanically follow that the Full Faith and Credit Clause compels North Carolina to accept them.

We have recognized an area of flexibility in the application of the Clause to preserve and protect state policies in matters of vital public concern. We have said that conflicts between such state policies should be resolved, "not by giving automatic effect to the full faith and credit clause, . . . but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight". *Alaska Packers Assn.* v. *Comm'n.*, 294 U. S. 532, 548. (See also *Milwaukee County* v. *White Co.*, 296 U. S. 268, 273-274, and compare the dissenting opinion in *Yarborough* v. *Yarborough*, 290 U. S. 202, 213-227.) That Clause should no more be read "with literal exactness like a mathematical formula" than are other great and general clauses of the Constitution placing limitations upon the States to weld us into a Nation. *Cf. Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 428. Rather it should be construed to harmonize its direction "with the necessary residuum of state power". *Id.*, at p. 435.

Prominent in the residuum of state power, as pointed out above, is the right of a state to deal with the marriage relations of its citizens and to pursue its chosen domestic policy of public morality in that connection. Both Nevada and North Carolina have rights in this regard which are entitled to recognition. The conflict between those rights here should not be resolved by extending into North Carolina the effects of Nevada's action through a perfunctory application of the literal language of the Full Faith and Credit Clause with the result that measures which North Carolina has adopted to safeguard the welfare of her citizens in this area of legitimate governmental concern are undermined. When the interests are considered, those of North Carolina are of sufficient validity that they should as clearly free her of the compulsions of the Full Faith and Credit Clause as did the interest of the state in the devolution of property within its boundaries in *Fall* v. *Eastin*, 215 U. S. 1; *Olmsted* v. *Olmsted*, 216 U. S. 386 and *Hood* v. *McGehee*, 237 U. S. 611, or the interest of a state in the application of its own workmen's compensation statute in *Alaska Packers Assn.* v. *Comm'n.*, *supra*, or its interest in declining to enforce the penal laws of another jurisdiction, cf. *Huntington* v. *Attrill*, 146 U. S. 657, 666, all of which seem to be matters of far less concern to a state than the untrammeled enforcement within its borders of those standards of public morality with regard to the marriage relation which it considers to be in the best interests of its citizens.

There is an element of tragic incongruity in the fact that an individual may be validly divorced in one state but not in another. But our dual system of government and the fact that we have no uniform laws on many subjects give rise to other incongruities as well—for example the common law took the logical position that an individual could have but one domicile at a time but this Court has nevertheless said that the Full Faith and Credit Clause does not prevent conflicting state decisions on the question of an individual's domicile. Cf. *Worcester County Co.* v. *Riley*, 302 U. S. 292, 299. In the absence of a uniform law on the subject of divorce this Court is not so limited in its application of the Full Faith and Credit Clause that it must force Nevada's policy upon North Carolina, any more than it must compel Nevada to accept North Carolina's requirements. The fair result is to leave each free to regulate within its own area the rights of its own citizens.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1942.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[December 21, 1942.]

Mr. Justice Jackson, dissenting.

I cannot join in exerting the judicial power of the Federal Government to compel the State of North Carolina to subordinate its own law to the Nevada divorce decrees. The Court's decision to do so reaches far beyond the immediate case. It subjects matrimonial laws of each state to important limitations and exceptions that it must recognize within its own borders and as to its own permanent population. It nullifies the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce. It subjects every marriage to a new infirmity in that one dissatisfied spouse may choose a state of easy divorce, in which neither party has ever lived, and there commence proceedings without personal service of process. The spouse remaining within the state of domicile need never know of the proceedings. Or, if it comes to one's knowledge, the choice is between equally useless alternatives: one is to ignore the foreign proceedings, in which case the marriage is quite certain to be dissolved; the other is to follow the complaining spouse to the state of his choice and there defend under the laws which grant the dissolution on relatively trivial grounds. To declare that a state is powerless to protect either its own policy or the family rights of its people against such consequences has serious constitutional implications. It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. The significance of this decision is best appraised by orienting its facts with reference to the States involved, for the Court approves this concrete case as

a pattern which anybody in any state may henceforth follow under the protection of the federal courts.

From the viewpoint of North Carolina, this is the situation: The Williamses, North Carolina people, were married in North Carolina, lived there twenty-five years, and have four children. The Hendrixes were also married in North Carolina and resided there some twenty years. In May of 1940, Mr. Williams and Mrs. Hendrix left their homes and respective spouses, departed the state, but after an absence of a few weeks reappeared and set up housekeeping as husband and wife. North Carolina then had on its hands three marriages among four people in the form of two broken families, and one going concern. What problems were thereby created as to property or support and maintenance, we do not know. North Carolina, for good or ill, has a strict policy as to divorce. The situation is contrary to its laws, and it has attempted to vindicate its own law by convicting the parties of bigamy.

The petitioners assert that North Carolina is made powerless in the matter, however, because of proceedings carried on in Nevada during their brief absence from North Carolina. We turn to Nevada for that part of the episode.

Williams and Mrs. Hendrix appear in the State of Nevada on May 15, 1940. For barely six weeks they made their residences at the Alamo Auto Court on the Las Vegas—Los Angeles Road. On June 26, 1940, both filed bills of complaint for divorce through the same lawyer, and alleging almost identical grounds. No personal service was made on the home-staying spouse in either case; and service was had only by publication and substituted service. Both obtained divorce decrees. The Nevada policy of divorce is reflected in Mrs. Hendrix's case. Her grounds were "extreme mental cruelty." She sustained them by testifying that her husband was "moody"; did not talk or speak to her "often"; when she spoke to him he answered most of the time by a nod or shake of the head and "there was nothing cheerful about him at all." The latter of the two divorces was granted on October 4, 1940, and on that day in Nevada they had benefit of clergy and emerged as man and wife. Nevada having served its purpose in their affairs, they at once returned to North Carolina to live.

The question is whether this Court will now prohibit North Carolina from enforcing its own policy within that State against these

North Carolinians on the ground that the law of Nevada under which they lived a few weeks is in some way projected into North Carolina to give them immunity.

I.

Our Function in the Matter.

There is confided to the Court only the power to resolve constitutional questions raised by these divorce procedures and not moral, religious, or social questions as to divorce itself. I do not know with any certainty whether in the long run strict or easy divorce is best for society or whether either has much effect on moral conduct. It is enough for judicial purposes that to each state is reserved constitutional power to determine its own divorce policy. It follows that a federal court should uphold impartially the right of Nevada to adopt easy divorce laws and the right of North Carolina to enact severe ones. No difficulties arise so long as each state applies its laws to its own permanent inhabitants. The complications begin when one state opens its courts and extends the privileges of its laws to persons who never were domiciled there and attempts to visit disadvantages therefrom upon persons who have never lived there, have never submitted to the jurisdiction of its courts, and have never been lawfully summoned by personal service of process. This strikes at the orderly functioning of our federal constitutional system, and raises questions for us.

The prevailing opinion rests upon a line of cases of which *Christmas* v. *Russell*, 5 Wall. 290, is typical. There is was said that "If the judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere." *Id.* at 302. This rule was uttered long ago in very different circumstances. The judgment there in question was on a promissory note, and the Court also said that: "Nothing can be plainer than the proposition is, that the judgment . . . . was a valid judgment in the State where it was rendered. Jurisdiction of the case was undeniable, and the defendant being found in that jurisdiction, was duly served with process, and appeared and made full defense." *Id.* at 301. But the same defendant tried to relitigate his lost cause when it was sought to give that judgment effect in his home state. This Court properly held that it was not competent for the courts of any other state to reopen the merits of the cause. This very wise rule against collateral impeachment of an ordinary judgment based

upon personal jurisdiction is now made to support the theory that we must enforce these very different Nevada judgments without more than formal inquiry into the jurisdiction of the court that rendered them.

The effect of the Court's decision today—that we must give extraterritorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first state to pass on the facts necessary to jurisdiction. It is for this Court, I think, not for state courts, to implement these great but general clauses by defining those judgments which are to be forced upon other states.

Conflict between policies, laws, and judgments of constituent states of our federal system is an old, persistent, and increasingly complex problem. The right of each state to experiment with rules of its own choice for governing matrimonial and social life is greatly impaired if its own authority is overlapped and its own policy is overridden by judgments of other states forced on it by the power of this Federal Court. If we are to extend protection to the orderly exercise of the right of each state to make its own policy, we must find some way of confining each state's authority to matters and persons that are by some standard its own.

The framers of the Constitution did not lay down rules to guide us in selecting which of two conflicting state judgments or public acts would receive federal aid in its extraterritorial enforcement. Nor was it necessary. There was, and is, an adequate body of law, if we do not reject it, by which to test jurisdiction or power to render the judgments in question so far as faith and credit by federal command is concerned. By the application of well established rules these judgments fail to merit enforcement for two reasons.

II.

Lack of Due Process of Law.

Thirty-seven years ago this Court decided that a state court, even of the plaintiff's domicile, could not render a judgment of divorce that would be entitled to federal enforcement in other states against a nonresident who did not appear, and was not personally served with process. *Haddock* v. *Haddock*, 201 U. S. 562 (1905 Term). The opinion was much criticized, particularly

in academic circles.[1] Until today, however, it has been regarded as law, to be accepted and applied, for good or ill, depending on one's view of the matter. The theoretical reasons for the change are not convincing.

The opinion concedes that Nevada's judgment could not be forced upon North Carolina in absence of personal service if a divorce proceeding were an action *in personam*. In other words, settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill.[2]

We have been told that this is because divorce is a proceeding *in rem*. The marriage relation is to be reified and treated as a *res*. Then it seems that this *res* follows a fugitive from matrimony into a state of easy divorce, although the other party to it remains at home where the *res* was contracted and where years of cohabitation would seem to give it local situs. Would it be less logical to hold that the continued presence of one party to a marriage gives North Carolina power to protect the *res*, the marriage relation, than to hold that the transitory presence of one gives Nevada power to destroy it? Counsel at the bar met this dilemma by suggesting that the *res* exists in duplicate—one for each party to the marriage. But this seems fatal to the decree, for if that is true the dissolution of the *res* in transit would hardly operate to dissolve the *res* that stayed in North Carolina. Of course this discussion is only to reveal the artificial and fictional character of the whole doctrine of a *res* as applied to a divorce action.

I doubt that it promotes clarity of thinking to deal with marriage in terms of a *res*, like a piece of land or a chattel. It might be more helpful to think of marriage as just marriage—a relationship out of which spring duties to both spouse and society and from which are derived rights,—such as the right to society and services and to conjugal love and affection—rights which generally prove to be either priceless or worthless, but which none the less

[1] It was twenty years before Professor Beale could justify the decision to his satisfaction. Compare Haddock Revisited, 39 Harvard Law Review 417, with Beale, Constitutional Protection of Decrees for Divorce, 19 Harvard Law Review 586. Others seems to lack his capacity for quick adjustment.

[2] Pennoyer v. Neff, 95 U. S. 714; Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189; cf. McDonald v. Mabee, 243 U. S. 90; Flexner v. Farson, 248 U. S. 289; Doherty & Co. v. Goodman, 294 U. S. 623; Milliken v. Meyer, 311 U. S. 457.

the law sometimes attempts to evaluate in terms of money when one is deprived of them by the negligence or design of a third party.

It does not seem consistent with our legal system that one who has these continuing rights should be deprived of them without a hearing. Neither does it seem that he or she should be summoned by mail, publication, or otherwise to a remote jurisdiction chosen by the other party and there be obliged to submit marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile was established.

Marriage is often dealt with as a contract. Of course a personal judgment could not be rendered against an absent party on a cause of action arising out of an ordinary commercial contract, without personal service of process. I see no reason why the marriage contract, if such it be considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign judgment without process than a party to any other contract. I agree that the marriage contract is different, but I should think the difference would be in its favor.

The Court thinks the difference is the other way: we are told that divorce is not a "mere *in personam* action" since *Haddock* v. *Haddock*, *supra*, held that domicile is necessary to jurisdiction for divorce. But to hold that a state cannot have divorce jurisdiction unless it is the domicile is not to hold that it must have such jurisdiction if it is the domicile, as *Haddock* v. *Haddock* itself demonstrates. Further support for this view seems to be seen in *Maynard* v. *Hill*, 125 U. S. 190, and in the Court's subsequent approval of that case in *Haddock* v. *Haddock*, *supra*, at 569, 572, 574, 575, 579. All that *Maynard* v. *Hill* decided was that the Territory of Washington had jurisdiction to cut off any interest of an absent spouse in land within its borders. But protection of land in the jurisdiction and protection against bigamy prosecutions out of the jurisdiction are plainly different matters.[3]

Although the Court concedes that its present decision would be insupportable if divorce were a "mere *in personam* action" it relies for support on opinions that the state where one is domiciled has

[3] Cf. Arndt v. Griggs, 134 U. S. 316; Dewey v. Des Moines, 173 U. S. 193; Fall v. Eastin, 215 U. S. 1; Olmsted v. Olmsted, 216 U. S. 386; Hood v. McGehee, 237 U. S. 611; Grannis v. Ordean, 243 U. S. 385; Clark v. Williard, 294 U. S. 211; Pink v. Highway Express Co., 314 U. S. 201.

the power to enter valid criminal, tax, and simple money judgments *against*—not *for*—him.[4] Those opinions are wholly inapposite unless they mean that Nevada has jurisdiction to nullify contract rights of a person never in the state or to declare that he is not liable for the commission of crime, and payment of taxes, or the breach of a contract, in another state; and I am sure that nobody has ever supposed they meant that.

To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other.[5] But it is quite a different thing to say that Nevada can dissolve the marriages of North Carolinians and dictate the incidence of the bigamy statutes of North Carolina by which North Carolina has sought to protect her own interests as well as theirs. In this case there is no conceivable basis of jurisdiction in the Nevada court over the absent spouses,[6] and, *a fortiori*, over North Carolina herself. I cannot but think that in its pre-occupation with the

[4] Lawrence v. State Tax Commission, 286 U. S. 276, 279; New York *ex rel.* Cohn v. Graves, 300 U. S. 308, 313; Milliken v. Meyer, 311 U. S. 457, 463-464; Skiriotes v. Florida, 313 U. S. 69.

[5] Cf. Arndt v. Griggs; Dewey v. Des Moines; Grannis v. Orleans; Clark v. Williard, *supra*, note 2.

[6] A spouse who appears and contests the jurisdiction of the court of another state to grant a divorce may not collaterally attack its findings of domicile and jurisdiction made after such appearance. Davis v. Davis, 305 U. S. 32. So also, a deserter from the matrimonial domicile may be bound by a divorce granted by a court of the state where the matrimonial domicile is situated, Whether fault on the part of the deserter is an essential seems on the basis of our cases on jurisdiction for divorce to be an open question: Atherton v. Atherton, 181 U. S. 155; Haddock v. Haddock, *supra*, at 570, 572, 583; and Thompson v. Thompson, 226 U. S. 551; but our decisions on analogous problems might be found to afford adequate support for a decision that it is not. Cf. State *ex rel.* Bond & Goodwin & Tucker v. Superior Court, 289 U. S. 361; Doherty & Co. v. Goodman, 294 U. S. 263. See, further, Restatement, Conflict of Laws, §§ 112, 113.

full faith and credit clause the Court has slighted the due process clause.

IV.

Lack of Domicile.

We should, I think, require that divorce judgments asking our enforcement under the full faith and credit clause, unlike judgments arising out of commercial transactions and the like, must also be supported by good-faith domicile of one of the parties within the judgment state.[7] Such is certainly a reasonable requirement. A state can have no legitimate concern with the matrimonial status of two persons, neither of whom lives within its territory.

The Court would seem, indeed, to pay lip service to this principle. I understand the holding to be that it is domicile in Nevada that gave power to proceed without personal service of process. That being the course of reasoning, I do not see how we avoid the issue concerning the existence of the domicile which the facts on the face of this record put to us. Certainly we cannot, as the Court would, by-pass the matter by saying that "We must treat the present case for the purposes of the limited issue before us precisely the same as if the petitioner had resided in Nevada for a term of years and had long ago acquired a permanent abode there." I think we should treat it as if they had done just what they have done.

The only suggestion of a domicile within Nevada was a stay of about six weeks at the Alamo Auto Court, an address hardly suggestive of permanence. Mrs. Hendrix testified in her case (the evidence in Williams' case is not before us) that her residence in Nevada was "indefinite permanent" in character. The Nevada court made no finding that the parties had a "domicile" there. It only found a residence—sometimes, but not necessarily, an equivalent.[8] It is this Court that accepts these facts as enough to establish domicile.

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[7] This was the decision in Bell *v.* Bell, 181 U. S. 175; and Andrews *v.* Andrews, 188 U. S. 14. Davis *v.* Davis, *supra*, note 6, in no way indicates that a finding of domicile after appearance of the absent spouse and litigation of the question would be conclusive upon the state of his domicile in litigation involving its interests and not merely those of the parties. Cf. Stoll *v.* Gottlieb, 305 U. S. 165, 172, n. 13.

[8] 1 Beale, Conflict of Laws (1935) § 10.3.

While a state can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other states. If Nevada may prescribe six weeks of indefinite permanent abode in a motor court as constituting domicile, she may as readily prescribe six days. Indeed, if the Court's opinion is carried to its logical conclusion, a state could grant a constructive domicile for divorce purposes upon the filing some sort of declaration of intention. Then it would follow that we would be required to accept it as sufficient and to force all states to recognize mail-order divorces as well as tourist divorces. Indeed, the difference is in the bother and expense—not in the principle of the thing.

The concept of domicile as a controlling factor in choice of law to govern many relations of the individual was well known to the framers of the Constitution. It was hardly contemplated that a person should be subject at once to two conflicting state policies, such as those of Nevada and North Carolina. It was undoubtedly expected that the Court would in many cases of conflict use one's domicile as an appropriate guide in selecting the law to govern his controversies.

Domicile means a relationship between a person and a locality. It is the place, and the one place, where he has his roots and his real, permanent home. The Fourteenth Amendment, in providing that one by residence in a state becomes a citizen thereof, probably used "residence" as synonomous with domicile. Thus domicile fixes the place where one belongs in our federal system. In some instances the existence of this relationship between the state and an individual may be a federal question, although this Court has been reluctant to accept that view.[9]

If in testing this judgment to determine whether it qualifies for federal enforcement we should apply the doctrine of domicile to interpretation of the full faith and credit clause, Nevada would be held to a duty to respect the statutes of North Carolina and not to interfere with their application to those whose individual

[9] Compare *Texas v. Florida*, 306 U. S. 398, with *Massachusetts v. Missouri*, 308 U. S. 1. And see Harrison and Tweed, Death and Taxation are Certain—But What of Domicile?, 53 Harvard Law Review 68, 76; "*Texas v. Florida* does not help the situation in the ordinary case because at the rates of tax prevailing in most of the states a controversy between the states of which the Supreme Court has jurisdiction can arise only if at least four states claim a tax and the estate consists of intangible property having a value of at least $30,000,000. On no other state of facts will the assets be insufficient to meet the claims of all of the claimant states."

as well as matrimonial domicile is within that state unless and until that domicile has been terminated. And North Carolina would not be required to yield its policy as to persons resident there except upon a showing that Nevada had acquired a domiciliary right to redefine the matrimonial status.

However, the trend of recent decision has been to break down the rigid concept of domicile as a test of the right of a state to deal with important relations of life. This trend has been particularly apparent in cases where the Court has authorized, if not indeed encouraged, the several states to set up their own standards of domicile and to make conflicting findings of domicile for the purpose of taxing the right of succession. *Worcester County Trust Co.*, v. *Riley*, 302 U. S. 292. The Court has completely repudiated domicile as the measure of a state's right to tax intangible property. *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 185. The present decision extends the trend to the field of matrimonial legislation. This direction is contrary to what I believe to be the purpose of our Constitution to prevent overlapping and conflict of authority between the states.

In the application of the full faith and credit clause to the variety of circumstances that arise when families break up and separate domiciles are established there are, I grant, many areas of great difficulty. But I cannot believe that we are justified in making a demoralizing decision in order to avoid making difficult ones.

IV.

Practical Considerations.

The Court says that its judgment is "part of the price of our federal system." It is a price that we did not have to pay yesterday and that we will have to pay tomorrow, only because this Court has willed it to be so today. This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of *stare decisis*. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy. We therefore search a judicial pronouncement

that ushers in a new order of matrimonial confusion and irresponsibility for some hint of the countervailing public good that is believed to be served by the change. Little justification is offered. And it is difficult to believe that what is offered is intended seriously.

The Court advances two "intensely practical considerations" in support of its present decision. One is the "complicated and serious condition" if "one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina." This of course begs the question, for the divorces were completely ineffectual for any purpose relevant to this case. I agree that it is serious if a Nevada court without jurisdiction for divorce purports to say that the sojourn of two spouses gives four spouses rights to acquire four more, but I think it far more serious to force North Carolina to acquiesce in any such proposition. The other consideration advanced is that if the Court doesn't enforce divorces such as these it will, as it puts it, "bastardize" children of the divorcees. When thirty-seven years ago Mr. Justice Holmes perpetrated this quip, it had point, for the Court was then holding divorces invalid which many, due to the confused state of the law, had thought to be good. It is difficult to find that it has point now that the shoe is on the other foot. In any event I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees.